(21)

No. 98-818-CFX Title: Harold F. Rice, Petitioner
v.
Benjamin J. Cayetano, Governor of Hawaii

Docketed: November 17, 1998 Court: United States Court of Appeals for the Ninth Circuit

Entry	Date	Proceedings and Orders
	Nov 17 1998	Petition for writ of certiorari filed. (Response due December 29, 1998)
	Dec 7 1998	Order extending time to file response to petition until December 29, 1998.
	Dec 7 1998	This extension is granted by Order of Justice O'Connor.
	Dec 29 1998	Brief of respondent Benjamin J. Cayetano, Governor in opposition filed.
	Jan 6 1999	Reply brief of petitioner Harold F. Rice filed.
	Jan 19 1999	REDISTRIBUTED. January 22, 1999
	Feb 12 1999	REDISTRIBUTED. February 19, 1999
	Feb 22 1999	REDISTRIBUTED. February 26, 1999
	Mar 1 1999	REDISTRIBUTED. March 5, 1999
	Mar 15 1999	REDISTRIBUTED. March 19, 1999
	Mar 22 1999	Petition GRANTED. SET FOR ARGUMENT October 6, 1999. **********
	Apr 29 1999	Order extending time to file petitioner's brief on the merits to and including May 27, 1999.
	May 24 1999	Brief amicus curiae of Pacific Legal Foundation filed.
	May 26 1999	Brief amici curiae of Campaign for Color-Blind America, et al. filed.
	May 27 1999	Joint appendix filed.
	May 27 1999	Brief of petitioner Harold Rice filed.
	May 27 1999	LODGING consisting of ten copies of a spiral bound volume containing ancestry enrollment, etc. submitted by counsel for the petitioner.
	May 27 1999	Brief amici curiae of Center for Equal Opportunity, et al. filed.
	May 27 1999	Brief amici curiae of Hou Hawaiians and Maui Loa Native Hawaiian Beneficiaries filed.
	Jun 11 1999	Order extending time to file respondent's brief on the merits to and including July 28, 1999.
	Jul 22 1999	Lodging consisting of nine xeroxed copies of pamphlet entitled Ten Years of Tribal Government Under I.R.A. submitted by amici Congress of American Indians, et al.
	Jul 28 1999	Brief of respondent Benjamin J. Cayetano, Governor filed.
	Jul 28 1999	Brief amicus curiae of Hawaii Congressional Delegation filed.
	Jul 28 1999	Brief amici curiae of California, et al filed.
	Jul 28 1999	Brief amici curiae of Office of Hawaiian Affairs, et al. filed.
	Jul 28 1999	Brief amicus curiae of National Congress of American Indians filed.
	Jul 28 1999	Brief amicus curiae of Kamehameha Schools Bishop Estate Trust filed.
	Jul 28 1999	Brief amici curiae of Council of Hawaiian Homestead

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No. 98-818-CFX

Entry	Date	Proceedings and Orders
		Association, et al. filed.
	Jul 28 1999	LODGING consisting of two documents submitted by counsel for amici Hawaiian Homestead Assns., et al.
	Jul 28 1999	Brief amicus curiae of United States filed.
	Jul 28 1999	Brief amici curiae of Alaska Federation of Natives and Cook Inlet Region filed.
	Aug 4 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument filed.
	Aug 13 1999	Application (99A149) to extend the time to file a petition for a rehearing from August 27, 1999 to September 3, 1999, submitted to Justice O'Connor.
	Aug 16 1999	Application (99A149) granted by Justice O'Connor extending the time to file until September 3, 1999.
	Aug 17 1999	CIRCULATED.
	Aug 30 1999	Lodging consisting of ten copies of three letters written by Dept.of Justice, submitted by the Solicitor General and distributed.
	Sep 3 1999	Reply brief of petitioner Harold F. Rice filed.
	Sep 3 1999	LODGING consisting of twelve spiral bound copies of selected documents cited in the reply brief submitted by counsel for the petitioner and distributed.
	Sep 8 1999	Record filed.
	Sep 10 1999	Motion of Solicitor General for leave to participate in oral argument as amicus curiae and for divided argument GRANTED.
	Sep 13 1999	Record filed.
	Oct 6 1999	ARGUED.

Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings in the court of appeals are listed in the caption of this petition. Lieutenant Governor Mazie K. Hirono, although listed in the caption of the court of appeals' opinion, was not a party to the proceedings in the court of appeals.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Harold F. Rice respectfully submits this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-18a) is reported at 146 F.3d 1075. The opinion of the district court (App., *infra*, 19a-43a) is reported at 963 F. Supp. 1547.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1998. A petition for rehearing was denied on August 20, 1998. App., *infra*, 44a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The pertinent provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution, the Constitution of the State of Hawaii, the Hawaii Admission Act, and the Hawaii Revised Statutes are reproduced at App., *infra*, 45a-55a.

STATEMENT OF THE CASE

This case involves a challenge under the Fourteenth and Fifteenth Amendments to an explicit racial restriction limiting the right to vote in statewide elections for the board of trustees of the Office of Hawaiian Affairs (OHA). The State of Hawaii limits the right to vote in such elections to the descendants of the races that inhabited the Hawaiian Islands before 1778. Haw. Rev. Stat. §§ 10-2, 13D-3. The United States Court of Appeals for the Ninth Circuit held that this facially race-based classification is subject only to rational basis review because

of the existence of a purported "trust relationship" between certain descendants of the favored race and the state and federal governments. Moreover, according to the court of appeals, this explicit racial restriction on voting would survive strict scrutiny in any event, because the very existence of a legislatively declared "public trust" or "special relationship" benefiting the favored race creates a compelling governmental interest in enhancing the electoral power of that racial group through a racially segregated electoral system.

This stunning chain of reasoning provides a road map for the wholesale circumvention of the Fourteenth and Fifteenth Amendments. Under the Ninth Circuit's holding, whenever a state legislature wishes to circumvent the Civil War Amendments and enact a racial preference, it need only preface the discriminatory legislation with a legislative designation of the preferred group as the beneficiary of a "public trust" or a "special relationship" with the government. Review of this decision is necessary in order to overturn this pernicious doctrine and reaffirm that *all* race-based restrictions on the right to vote are forbidden by the Fifteenth Amendment and that *all* governmental classifications based on race are subject to the strictest judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment.

1. OHA was established by Article XII, Section 5 of the Hawaiian Constitution in 1978. It is an agency of the State of Hawaii created to provide public assistance and support to two classes of persons defined solely by race: "[n]ative Hawaiian[s]" (defined as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778") and "Hawaiian[s]" (defined as "any descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in

Hawaii").[1] Haw. Rev. Stat. § 10-2. OHA was created to provide a wide range of governmental services to these two racial classes of Hawaiian citizens, including identifying "physical, sociological, psychological and economic needs," organizing and implementing programs to meet those needs, and interacting as an independent state agency with federal and private entities and with other state agencies. Haw. Rev. Stat. §§ 10-6, 10-4; *see also* 1996-97 OHA Biennial Report 10-33 (describing broad range of OHA programs and services, including health and human services such as funding for "traditional Hawaiian" health and healing practices and the promotion of information and access to affordable medical and social programs; grants and programs to promote traditional "Hawaiian" culture; advocacy for individual and general rights of "Hawaiians" to land and natural resources; economic development programs such as loans and grants; educational programs such as grants and programs for gifted and talented "Hawaiian" children; and housing assistance such as low-interest loans).

OHA oversees two separate funds, each administered on racial grounds. The first is composed primarily of legislative appropriations from general tax revenues that are managed and administered by OHA as a "trust" for both "native Hawaiians" and "Hawaiians." Haw. Const. art. XII, § 5. OHA expends these funds for the benefit of all descendants of the races inhabiting the islands before 1778, without regard to blood quantum. 1993-94 OHA Biennial Report 5. The second trust, which comprises the vast majority of OHA funds, consists of a state-determined portion (currently 20 percent) of the receipts from a public lands trust transferred from the federal government to the State of Hawaii by the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), and

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[1] The 1778 date reflects the first known European contact with the Hawaiian Islands.

continued under the authority of the State of Hawaii by Article XII, Section 4, of the Hawaiian Constitution. *See* Haw. Rev. Stat. § 10-13.5 (setting 20 percent allocation). Unlike the appropriations from the Hawaiian legislature, which are expended on behalf of *both* racial groups (*i.e.*, "Hawaiians" and "native Hawaiians"), the annual public land receipts can be expended only for the sole benefit of "native Hawaiians," meaning those descendants of the pre-1778 races who also pass the 50 percent blood quantum test. *See* 83-2 Haw. Att'y Gen. Op., 1983 WL 41853 (April 15, 1983) (directing OHA to use funds derived from ceded lands to better conditions of only "native Hawaiians," not "Hawaiians"); *see also* 1993-94 OHA Biennial Report at 5 (setting forth OHA's policy of limiting beneficiaries to those with 50 percent or more native blood whenever a project is funded solely by ceded land proceeds, but opening class of beneficiaries to all descendants of pre-1778 inhabitants if ceded lands funds are matched by funds appropriated by the state legislature or other sources).[2] Within these parameters, OHA trustees have broad discretion in administering these funds. *See* 1993-94 OHA Biennial Report at 5 ("Although OHA is technically part of the Hawai'i state government, it operates as a semi-autonomous entity. It

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[2] OHA has been sued repeatedly by litigants arguing that it improperly gives benefits to individuals who, though racially "Hawaiian," do not meet the 50 percent blood quantum requirement. *See, e.g., Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990) (allowing 42 U.S.C. § 1983 suit by native Hawaiians against OHA trustees claiming trustees were spending ceded land proceeds for purposes other than the benefit of "native Hawaiians"); *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986) (upholding the statutory definition of "Hawaiians" against claim by "native Hawaiians" that definition improperly expanded class of intended beneficiaries and violated equal protection by distributing benefits without regard to blood quantum).

is run by nine trustees, all Hawaiians elected by Hawaiians. Its operating budget is approved by the state legislature, but trustees have discretion over trust funds.").[3]

Although the ceded land trust has its origin in federal law, the OHA race-based regime, and in particular the racial voting restriction for OHA elections, is entirely a creature of state law. As a result of the Annexation Act of 1898, 30 Stat. 750 (1898), pursuant to which the Republic of Hawaii became a United States possession, roughly 1,800,000 acres of previously crown, government, and public lands in Hawaii were ceded to the United States. The Annexation Act provided that all revenues from these public lands were to "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* The Organic Act, passed in 1900, established the Territory of Hawaii and confirmed that the public lands ceded to the United States would remain in the possession of the government of the Territory for public works and other public purposes. Organic Act of 1900, ch. 339, § 91, 31 Stat. 141 (1900).

Hawaii became a State in 1959. Hawaii Admission Act, 73 Stat. 4. The Hawaii Admission Act conveyed the ceded public lands to the new State of Hawaii, and provided that these public lands would be held by the State as a "public trust" for five general purposes: "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, [3] for the development of farm and home ownership on as widespread a basis as possible, [4] for the making of

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[3] The amount of funds controlled by OHA is staggering. For example, as of the end of fiscal year 1997, OHA controlled a total fund balance in excess of $232,000,000. 1996-97 OHA Biennial Report, Independent Auditors' Report 10.

public improvements, and [5] for the provision of lands for public use." *Id.* at § 5(f).

Hawaii was given complete discretion to choose from among the five stated purposes in administering the trust. Hawaii. Admission Act, § 5(f) ("Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide."). From 1959 until the creation of OHA in 1978, the ceded land trust was administered in race-neutral terms for the benefit of all Hawaiian citizens, with most of the proceeds going to the Hawaii Department of Education. App., *infra*, 5a; 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

Article XII, Section 5, of the Hawaiian Constitution requires that the members of the board of trustees of OHA "shall be Hawaiians" and are to be "elected by qualified voters who are Hawaiians, as provided by law." The implementing statute, Haw. Rev. Stat. § 13D-3(b), similarly provides that "[n]o person shall be eligible to register as a voter for the election of [OHA] board members unless the person . . . is Hawaiian." In each case, "Hawaiian" is defined exclusively in terms of race and ancestry: descendants of the pre-1778 races inhabiting the Hawaiian Islands. App., *infra*, 6a.

2. Petitioner was born and currently lives in Hawaii as a citizen, taxpayer, and qualified elector of the United States, the State of Hawaii, and the County of Hawaii. Petitioner's family has lived in Hawaii since the nineteenth century. Petitioner, however, does not satisfy the racial requirements for "native Hawaiian" or "Hawaiian" established by the State of Hawaii.

In March 1996, petitioner applied to vote in the August 1996 election for trustees of OHA. The registration form contained the following declaration: "I am

also Hawaiian and desire to register to vote in OHA elections." App., *infra,* 6a-7a.[4] Petitioner crossed off the phrase "am also Hawaiian and" and marked "yes" on the application. Although petitioner meets all other requirements for voting except the racial requirement, the State denied his application. *Id.* at 7a.

3. Petitioner filed suit in the United States District Court for the District of Hawaii, contending that he had been denied his right to vote in elections for trustees of OHA because of his race, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution. App., *infra*, 9a, 19a. In his Second Amended Complaint, petitioner sought a declaratory judgment that the race-based voting qualification violated the Fourteenth and Fifteenth Amendments. *See* App., *infra*, 7a, 21a.

4. On May 6, 1997, the district court entered summary judgment against petitioner. App., *infra*, 19a-43a. The district court concluded that the United States and the State of Hawaii had undertaken a special relationship with the descendants of the peoples that inhabited the Hawaiian Islands before 1778. Relying on *Morton v. Mancari*, 417 U.S. 535 (1974), the court held that the State's restriction on the franchise to individuals with Hawaiian blood was not a racial distinction, but a "political" one, subject only to rational basis scrutiny. Applying such minimal scrutiny, the court concluded that the OHA voting limitation was reasonably related to Hawaii's obligation to fulfill its trust responsibility to the descendants of the races inhabiting the islands before 1778. In addition, the court concluded that limiting the right to vote for OHA trustees to the beneficiaries of the trust was a rational restriction, and that the OHA election

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[4] It is undisputed that the reference to "Hawaiian" on this form did not encompass all Hawaiian citizens, but was instead limited to racial "Hawaiians."

was a "special interest" election within the meaning of *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

5. The court of appeals affirmed. App., *infra*, 1a-18a. Although the court conceded that "the Hawaiian Constitution and Haw. Rev. Stat. § 13D-3 contain a racial classification on their face" and that the voting requirements were "clearly racial," it nonetheless upheld the classification under *Salyer* as a "rational" restriction limiting eligible voters in a "special purpose[ ]" election to those most affected by the limited jurisdiction of the agency in question. App., *infra*, 12a-16a. The court reasoned that "elections may be held for special purposes and voter qualifications that might otherwise be invalid may survive when they limit eligible voters to those who are disproportionately affected and the government agency does not perform fundamentally governmental functions." *Id.* at 12a.

The court also relied heavily on *Mancari* for the proposition that the classification was primarily "political" rather than racial and subject only to rational basis review. The court of appeals recognized, however, that "Hawaiians are not exactly like Indians (for example, they aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution)." App., *infra*, 14a. Nonetheless, the court concluded that it was not compelled "to invalidate the voting restriction simply because it appears to be raced-based without also considering the unique trust relationship that gave rise to it." *Id.* In fact, the court of appeals, like the district court, read *Mancari* as holding that rational basis scrutiny applies whenever the classification at issue reflects a "trust relationship" with an identifiable class, regardless of the racial quality of the distinction or whether the people so classified are recognized as a quasi-sovereign tribe. Because "the special treatment of Hawaiians and native Hawaiians" involved "the establishment of trusts for their benefit . . . similar to the

special treatment of Indians . . . approved in *Mancari*," the court of appeals reasoned, the voting restrictions on OHA trustee elections involve a "political rather than a racial classification, even though racial criteria may be used in defining eligibility." *Id.*[5]

The court of appeals next concluded that this explicitly racial voting requirement passed rational basis review, noting that "[w]e have no trouble understanding why Hawaii would want the people who have an interest in the trust to vote for trustees, and it is rational for the state to make this decision in light of its trust responsibilities for Hawaiians and native Hawaiians." App., *infra*, 17a. The court then went on to hold that Hawaii's racial voting restriction also survived even strict scru-

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5 In addition, the court of appeals characterized petitioner's challenge as limited to the denial of his right to vote and not specifically aimed at the existence of OHA, the racial composition of its board of trustees, or the original land set-aside for the benefit of native Hawaiians and Hawaiians. As a result, the court stated that it felt itself obligated to assume that these racially discriminatory programs were both constitutional and of the utmost importance. App., *infra*, 9a ("If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be."). Having thus assumed away the naked racial classification, the court then restated the issue as simply whether trustee elections can legitimately be limited to the beneficiaries of the trust. Thus, the court recharacterized what it had earlier recognized as the "clearly racial" voting restriction as "not primarily racial, but legal or political." *Id.* at 10a.

tiny. *Id.* at 17a-18a. According to the court of appeals, Hawaii has a "compelling" interest in "honor[ing] the trust," and "the restriction on voter eligibility is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties' would be the best way to insure proper management and adherence to the needed fiduciary principles." *Id.* at 17a.

REASONS FOR GRANTING THE WRIT

In its decision below, the Ninth Circuit has distinguished away a century of this Court's constitutional equal protection and voting rights jurisprudence in order to uphold a broad and patently offensive regime of racially segregated voting in the State of Hawaii. Despite its recognition that the state laws implementing the OHA voting restriction "contain a racial classification on their face," the court of appeals distorted beyond recognition two unrelated doctrines -- the *Mancari* Court's recognition of the "special relationship" between the United States and members of formally recognized Indian tribes, and the *Salyer* Court's creation of a "special purpose election" exception to the Fourteenth Amendment's one-person-one-vote requirement -- to hold that the purely racial classifications of "Hawaiian" and "native Hawaiian" do not violate the clear and unambiguous prohibitions of the Fifteenth Amendment and are subject only to minimal rational basis review under the Equal Protection Clause. Compounding the damage wrought by its decision, the court of appeals then went on to hold in the alternative that even if strict scrutiny does apply, the State enjoys a "compelling" interest in ensuring that only the racially defined beneficiaries of Hawaii's racial preferences can participate in electing the trustees who administer this racial spoils system.

In following this tortured course to its erroneous conclusion, the court of appeals has created conflicts with numerous decisions of this Court and has introduced new and pernicious loopholes into the previously

clear rules laid down by this Court under the Fourteenth and Fifteenth Amendments. Until now, there was no room for doubt that, under this Court's precedents, race-based election laws are strictly forbidden by the Fifteenth Amendment and state-mandated racial classifications are subject to strict judicial scrutiny under the Equal Protection Clause of the Fourteenth Amendment. The decision below constitutes a direct challenge to the clarity of this Court's pronouncements in this area, suggesting that any time a state legislature wishes to circumvent the Civil War Amendments and enact a racial voting restriction or preference, it need only preface the discriminatory legislation with the creation of a "public trust" or "special relationship" on behalf of the preferred group.

The court of appeals' stunning departure from settled legal principles announced by this Court threatens to undermine the single most important legal principle announced by our Constitution and by the decisions of this Court: that government-sponsored racial discrimination will not be tolerated in American society. Because of the magnitude of the Ninth Circuit's errors and their troublesome impact on voting rights and equal protection jurisprudence, this Court's review is warranted.

I. The Court Of Appeals' Holding That The Fifteenth Amendment Does Not Apply To Statewide Elections For Limited-Purpose Offices Is Irreconcilable With Decisions Of This Court

Despite the plain terms of the Fifteenth Amendment and more than a century of this Court's jurisprudence to the contrary, the court of appeals held that the Fifteenth Amendment does not apply to all statewide elections for public office. Rather, the court held that the "special purpose election" exception to the Fourteenth Amendment's one-person-one-vote rule also limits the scope of the Fifteenth Amendment's prohibition of race-based election laws. App., *infra*, 12a, 14a-16a. That

striking and unprecedented holding finds no support in the text or history of the Fifteenth Amendment, and it is flatly contradicted by several decisions of this Court.

A. The Fifteenth Amendment Applies To All Elections Of Public Officials

The Fifteenth Amendment's command is clear: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any state on account of race . . . ." U.S. Const. amend. XV, § 1. The prohibition of race-based voting restrictions is absolute; the Amendment contains no exceptions, and this Court has not created any. *City of Mobile v. Bolden*, 446 U.S. 55, 61-62 (1980); *Guinn v. United States*, 238 U.S. 347, 362-63 (1915) ("[I]t is . . . beyond the possibility of question that the [Fifteenth] Amendment in express terms restricts the power . . . to abridge or deny the right . . . to vote on account of race . . . . [T]he command of the Amendment was self-executing and reached without legislative action the conditions of discrimination against which it was aimed."). As this Court explained in *United States v. Reese*, 92 U.S. 214, 218 (1875), the Fifteenth Amendment "has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination in the exercise of the elective franchise on account of race, color or previous condition of servitude." *See also United States v. Cruikshank*, 92 U.S. 542, 555-56 (1875) (observing that "exemption from discrimination in the exercise of [the right of suffrage] on account of race," rather than the suffrage itself, is "a necessary attribute of national citizenship"); *Terry v. Adams*, 345 U.S. 461, 467 (1953) ("The [Fifteenth] Amendment bans racial discrimination in voting by both state and nation.").

Equally clear is that the Fifteenth Amendment's prohibition of race-based voting laws applies to *all* elections for public officials. "Clearly, the [Fifteenth] Amendment *includes any election in which public issues are decided or public officials selected*." *Terry*, 345 U.S. at 468 (emphasis added); *see also Grey v. Sanders*, 372 U.S. 368, 380 (1963) ("The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to all phases of state elections."); *Smith v. Allwright*, 321 U.S. 649, 657 (1944) ("[T]he Fifteenth Amendment specifically interdicts *any denial* or abridgment by a State of the right of citizens to vote on account of color.") (emphasis added).

That the Fifteenth Amendment applies to all elections for public officials is further confirmed by Section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965), which this Court has noted "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Chisom v. Roemer*, 501 U.S. 380, 392 (1991); *accord City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980). As originally enacted, Section 2 provided that "[n]o voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision to deny or abridge the right . . . to vote on account of race or color." 79 Stat. 437.[6] As this Court observed in *Chisom*, "Section 2 protected the right to vote, and it did so *without making any distinctions or imposing any limitations as to which elections would fall within its purview*." 501 U.S. at 392 (emphasis added). Indeed, the Court quoted with approval the statement of Attorney General Katzenbach that "'[e]very election in which registered electors are permitted to vote would be covered' under § 2." *Id.* (quoting Hearings on H.R. 6400 and Other Proposals to Enforce the Fifteenth Amendment to the Constitution of the United States before Subcomm. No. 5 of the House

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6 Section 2 was amended in 1982 in order to relieve plaintiffs of the burden of proving discriminatory intent, as required for a violation of the Amendment itself. *See Chisom*, 501 U.S. at 391-96.

Comm. on the Judiciary, 89th Cong., 1st Sess., 21 (1965)); *see also id.* at 405 (Scalia, J., dissenting) ("I agree with the Court that the original legislation, directed toward intentional discrimination, applied to all elections, for it clearly said so.").

Thus, the court of appeals' unprecedented narrowing of the Fifteenth Amendment, and in particular its conclusion that "this isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis" (App., *infra*, 15a), directly conflict with the plain language of the Fifteenth Amendment and with this Court's case law. Rather than being an example of a hitherto undiscovered category of racially preferential election laws that fall outside the scope of the Fifteenth Amendment, the OHA election laws are instead precisely the type of race-based voting restrictions that the Fifteenth Amendment forbids. *See, e.g., Lane v. Wilson*, 307 U.S. 268, 275 (1939) ("The Amendment nullifies sophisticated as well as simple-minded modes of discrimination."); *Neal v. Delaware*, 103 U.S. 370, 389 (1880). The Ninth Circuit's creation of a clear exception to the unambiguous mandate of the Fifteenth Amendment is irreconcilable with this Court's Fifteenth Amendment jurisprudence and compels further review.

B. The *Salyer* "Special Purpose Election" Exception Does Not Restrict The Scope Of The Fifteenth Amendment

In *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), this Court held that an election for a governmental body that serves a "special limited purpose" and whose decisions "disproportionate[ly] [a]ffect" a limited group of landowners may be limited to that group of landowners without violating the one-person-one-vote mandate of the Equal Protection Clause of the Fourteenth Amendment. *Id.* at 728; *see also Ball v. James*, 451 U.S. 355 (1981) (upholding constitutionality of an Arizona

system for electing directors of agricultural improvement and power district that limited voter eligibility to landowners and apportioned voting power according to number of acres owned).

The Ninth Circuit below held that the scope of OHA's responsibility to deliver governmental support services to racial "Hawaiians" satisfies the "special limited purpose" prong of *Salyer*, and that the effects of OHA's services were sufficiently focused on those individuals to satisfy the "disproportionate effect" prong. App., *infra*, 13a, 15a-16a. Although the court of appeals "recognize[d] that the [OHA] qualification has to do with race instead of ownership of land, as in *Salyer*," it nonetheless relied on *Salyer* in concluding that the OHA election "isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." *Id.* at 13a, 15a.

Thus, the court of appeals has expanded *Salyer* from a narrow exception to the one-person-one-vote rule of the Fourteenth Amendment into a broad exception to the previously strict prohibitions against racial discrimination announced by the Fourteenth and Fifteenth Amendments. This dramatic expansion of the *Salyer* doctrine would shield from close scrutiny any racial restriction on access to the ballot box, so long as those who are permitted to vote are the special objects of attention of the limited-purpose government body for whom they are voting. Indeed, under the Ninth Circuit's reasoning, if the governing body for which elections are held is charged with targeting benefits and services to a particular racial group, there is seemingly no limit to the number or types of racial voting restrictions a State can employ. Nothing in *Salyer* or its progeny authorizes this transmogrification of the race-neutral *Salyer* doctrine into an excuse for government-sponsored racial discrimination in voting.

The court of appeals' decision also conflicts with *Salyer* by extending the "special limited purpose" exception to a state agency that expends general tax revenues. Because a substantial portion of the funds in OHA's "trusts" comes from the general taxes paid by all citizens of Hawaii, *see, e.g.*, 1997 Haw. Sess. L., Act 240 (appropriating millions of dollars of general tax proceeds to OHA for fiscal years 1997-1999), the court of appeals has forsaken the "disproportionate effect" prong of *Salyer*. *See Salyer*, 410 U.S. at 727 (distinguishing and disapproving lopsided voting schemes in which "those persons excluded from voting . . . contributed both directly through local taxes and indirectly through increased rents"); *Kessler v. Grand Central Dist. Management Ass'n, Inc.*, 158 F.3d 92, 107 (2d Cir. 1998) (applying *Salyer* to a Manhattan business improvement district because "[d]istrict residents . . . are not, unless they own property, subject to the assessment. Residents pay no additional taxes as a result of living within the [district]."). Critical to the result in *Salyer* was the fact that "there is no way that the economic burdens of district operations can fall on residents *qua* residents." 410 U.S. at 729. The same cannot be said here, where OHA expends millions of dollars of general tax monies annually.

There is no support for the court of appeals' drastic expansion of *Salyer* or for the resulting narrowing of the Fifteenth Amendment's scope. Indeed, *Salyer* is entirely inapposite to application of the Fifteenth Amendment: *Salyer* is concerned only with a property-based exception to the Equal Protection Clause's one-person-one-vote rule, whereas the Fifteenth Amendment occupies the field of race-based restrictions on voting by prohibiting such restrictions outright. This Court's intervention is necessary to correct the Ninth Circuit's erroneous extension of *Salyer* and to reaffirm that the promise of the Fifteenth Amendment is not an empty one.

II. The Decision Below Conflicts With This Court's Decision In *Morton v. Mancari* By Holding That The "Special Relationship" Between The United States And Formally Recognized Indian Tribes Authorizes State-Sponsored Discrimination On The Basis Of Non-Tribal, Racial Classifications

In purporting to justify the racial classification at issue here on the basis of the "special relationship" recognized by this Court in *Morton v. Mancari*, 417 U.S. 535 (1974), the court below adopted a reading of *Mancari* that is inconsistent with that decision and that authorizes the wholesale evasion of this Court's recent Equal Protection Clause jurisprudence. In *Mancari*, the Court held that a "special relationship" exists between the United States and formally recognized Indian tribes by virtue of the Indian Commerce and Treaty Clauses, and accordingly concluded that a congressionally mandated hiring preference for tribal members employed by the Bureau of Indian Affairs (BIA) was a political rather than a racial preference and was subject only to rational basis review. *Id.* at 533-34, 535 n.24. By contrast, the court below held that rational basis review applies whenever the classification at issue reflects a "trust" relationship between a State and an identifiable class, even if the classification at issue is explicitly racial rather than political and even if the benefited racial group is not recognized as a quasi-sovereign tribe. That holding is impossible to reconcile with *Mancari*.

A. The *Mancari* "Special Relationship" Turns On Recognized Tribal Membership, Not Merely A Declared Trust Relationship

In direct contrast to the approach followed below, this Court in *Mancari* carefully distinguished between "Indian tribes" as a political classification and "Indians" as a racial classification, making clear that the "special relationship" is limited to the former and that classifications based on Indians as a purely racial designation

would be subject to the same exacting scrutiny as any other racial classification. Thus, the BIA hiring preference at issue in *Mancari* was subject to rational basis review only because it applied "to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities." 417 U.S. at 554. BIA's policy was "not directed towards a 'racial' group consisting of 'Indians'; instead, it applie[d] only to members of 'federally recognized' tribes." *Id.* at 553 n.24. The Court emphasized that the requirement of tribal membership "operates to exclude many individuals who are racially to be classified as 'Indians,'" and, as a result, "the preference is political rather than racial in nature." *Id.*

Subsequent cases confirm that the existence of a formally recognized tribal government is the defining characteristic of this "special relationship." *See, e.g.*, *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (upholding delegation of authority to tribes because "Indian tribes are unique aggregations possessing attributes of sovereignty over both their members and their territory" and because "they are 'a separate people' possessing 'the power of regulating their internal and social relations'") (citations omitted); *Fischer v. District Court*, 424 U.S. 382, 390 (1976) (exclusive jurisdiction of tribal court was not impermissible racial discrimination because "[t]he exclusive jurisdiction of the Tribal Court does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law"); *United States v. Antelope*, 430 U.S. 641, 645-46 (1977) ("Federal legislation with respect to *Indian tribes*, although relating to Indians as such, is not based upon impermissible racial classifications," but is "rooted in the unique status of Indians as 'a separate people' with their own political institutions.") (emphasis added); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) ("It is settled that 'the unique legal status of *Indian tribes* under federal law' permits the Federal

Government to enact legislation singling out *tribal Indians*, legislation that might otherwise be constitutionally offensive.") (citation omitted; emphasis added).

Mancari and its progeny trace the authority for the "special relationship" to the Indian Commerce and Treaty Clauses of the Constitution. *Mancari*, 417 U.S. at 551-52. The Court has grounded the special relationship primarily in the Indian Commerce Clause, which gives Congress the power to regulate commerce "with the *Indian Tribes*," not with Indians generally. U.S. Const. art. I, § 7 (emphasis added).[7] Given these essential constitutional underpinnings of the "special relationship," it is plain that that relationship does not and cannot extend beyond formally recognized Indian tribes. *See generally* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537 (1996).

As the court of appeals correctly conceded, racial "Hawaiians" "aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution." App., *infra*, 14a. Thus, the court of appeals' decision is squarely inconsistent with *Mancari* and its progeny, because it simply ignores the key limiting factors of those decisions -- the presence of a quasi-sovereign Indian tribe with which Congress enjoys a constitutionally mandated "special relationship," and the presence of a tribal (as opposed to a purely racial) classification.

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[7] The second constitutional underpinning for the "special relationship," the Treaty Clause, confirms that the doctrine is limited to quasi-sovereign tribal entities. *See Mancari*, 417 U.S. at 552 (Treaty Clause "has often been the source of the Government's power to deal with Indian tribes"); *see also McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973) ("[F]ederal authority over Indian matters . . . derives from federal responsibility for regulating commerce with Indian tribes and for treaty making.").

Unlike the tribal membership classification upheld in *Mancari*, the blood quantum requirement at issue in this case is a blatant racial distinction unconnected to any membership in a quasi-sovereign Indian tribe. As a result, the court of appeals' reliance on *Mancari* to uphold this explicitly racial restriction is in direct conflict with *Mancari* and its progeny.[8]

B. The Decision Below Conflicts With This Court's Decision in *Washington v. Yakima Indian Nation*

In addition to violating the principles announced in *Mancari*, the court of appeals' opinion directly conflicts with this Court's decision in *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), which held that the *Mancari* "special relationship" does not apply to the States. *Id.* at 500-01 ("'[T]he unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians . . . . *States do not enjoy this same unique relationship with Indians.*") (quoting *Mancari*, 417 U.S. at 551-52) (emphasis added). At issue in *Yakima Nation* was the State of Washington's legislative assumption of civil and criminal jurisdiction over Indians and Indian territory within the State. The Court made clear that *Mancari*'s "special relationship" does not apply to the States, but upheld Washington's assumption of jurisdiction because "[i]t was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over

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8 If *Mancari* could be read in the manner adopted by the court below, it would be irreconcilable with this Court's more recent Equal Protection Clause jurisprudence, particularly *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and would have to be overruled. *See, e.g., Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997) (questioning whether *Mancari* survives *Adarand*).

Indians." *Id.* at 501. Thus, because "Washington was legislating under explicit authority granted by Congress" in the exercise of Congress's "plenary power over Indian affairs," Washington's actions fell within the "special relationship," and the State's classification based on tribal status was subject only to rational basis review. *Id.*

Congress has granted no such "explicit authority" to Hawaii to restrict the right to vote in OHA elections to racial "Hawaiians." Indeed, as described above, nothing in the Hawaii Admission Act even sets aside any portion of the ceded lands trust exclusively for "native Hawaiians" (*see* Hawaii Admission Act § 5(f)), and Congress has never authorized racially segregated voting in OHA elections. Moreover, even if the Act could be construed to support the notion of a trust relationship, it is expressly limited to "native Hawaiians," *i.e.*, descendants of pre-1778 races that satisfy the 50 percent blood quantum requirement. The Act does not even address, let alone authorize, the much broader racial classification of "Hawaiians." Accordingly, the court of appeals' holding that the racial voting restriction for OHA elections is justified by the *Mancari* "special relationship" is flatly inconsistent with *Yakima Nation*'s holding that the "special relationship" does not apply to the States. Review by this Court is warranted to correct this erroneous and significant expansion of *Mancari*.

III. The Court Of Appeals' Decision Conflicts With, And Threatens Substantially To Undermine, This Court's Decisions In *Croson* And *Adarand*

A. The Decision Below Violates This Court's Precedents By Holding That Rational Basis Review Applies To An Explicit Race-Based Classification Adopted By A State

The court below correctly recognized that the OHA election laws establish a facially race-based classification. App., *infra*, 11a. Rather than examine those laws

under the strict scrutiny mandated by this Court, however, the court of appeals applied its broad new "trust relationship" exception to eviscerate this Court's pronouncements in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). The glaring inconsistency between the decision below and the pronouncements of this Court demands immediate resolution.

As this Court has repeatedly held, the Equal Protection Clause is uncompromising in its requirement that courts must apply strict judicial scrutiny to all race-based legislation: "[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227; *accord Croson*, 488 U.S. at 496-97; *Shaw v. Reno*, 509 U.S. 630, 644 (1993). "In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, 515 U.S. at 227. Indeed, "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw*, 509 U.S. at 642. On these fundamental questions, this Court has appropriately left no room for debate.

Moreover, both *Adarand* and *Croson* make clear that classifications based solely on race are subject to strict scrutiny *regardless* of the particular race(s) involved. Significantly, both cases involved programs that included Native Americans (defined racially, without reference to tribal affiliation) among the enumerated beneficiaries. *See Adarand*, 515 U.S. at 205 (program benefiting "'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities'") (emphasis added; citation omitted); *Croson* 488 U.S. at 478 (program benefiting "'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts'") (emphasis added; citation omitted). In both cases, this Court treated the legislative classifications (including

those involving Indians) as purely racial in nature, and applied strict scrutiny to *all* of them. In *Croson*, for example, the Court referred to the benefited classes other than African Americans (including Indians) as "racial groups" and concluded that they could not survive strict scrutiny, because "there is absolutely no evidence of past discrimination against . . . Indian . . . persons in any aspect of the city's construction industry." *Id.* at 506. *Croson* thus confirms that *Mancari*'s rational basis test is inapplicable to non-tribal classifications of Native Americans and other racial groups -- including "native Hawaiians" and "Hawaiians."

After the Ninth Circuit's decision in this case, however, in which the court concluded that the existence of a legislatively declared "trust relationship" converts a racial preference subject to strict scrutiny into a merely political or legal classification subject to rational basis review, any legislature can, merely by adding the magic words "trust relationship" to a statute, shield race-based legislation from the strict scrutiny mandated by *Croson* and *Adarand*. As Justice Frankfurter warned, when faced with a similarly pernicious attempt to circumvent the Fourteenth and Fifteenth Amendments, "[i]t is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." *Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (internal quotation marks and citation omitted). For this reason, this Court's review is essential.

B. The Court Of Appeals' Alternative Holding That Hawaii's Race-Based Voting Requirement Satisfies Strict Scrutiny Is Irreconcilable With Precedent

The court of appeals concluded its opinion with a brief and conclusory pronouncement that the OHA election scheme could survive even strict scrutiny. The court reasoned that "the scheme for electing [OHA] trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on

voter eligibility is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" App., *infra*, 17a (quoting 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644). The court's holding in this regard is inconsistent with the jurisprudence of this Court.

1. The only compelling interest that this Court has found sufficient to justify race-based laws is the need to remedy present discrimination or the present effects of past discrimination. *Adarand*, 515 U.S. at 227; *Croson*, 488 U.S. at 496-97. Nothing in the record demonstrates the existence of past or present discrimination so as to justify race-conscious remedies here, nor did the courts below purport to rest their decisions on that ground. This glaring absence is sufficient in itself to demonstrate that Hawaii's racial voting scheme cannot survive strict scrutiny. *Croson*, 488 U.S. at 505-06.

The court of appeals, however, identified two other interests that it viewed as compelling: (1) the responsibility to honor the "trust," and (2) the "perceived value" of a board "'chosen from among those who are interested parties.'" App., *infra*, 17a. Neither of these purportedly "compelling" interests suffices to justify a racial classification under this Court's precedents. The first falls short because it is predicated on a fallacy -- that the State is somehow compelled to administer its public trust lands in a manner that differentiates away Hawaiian citizens on the basis of race. Simply put, there is nothing in either the terms of the Hawaii Admission Act or in the practices of the State of Hawaii prior to 1978 that requires that approach. To the contrary, the Act spelled out five possible uses for the lands it granted to the State, without providing that *any* portion of the trust lands must be set aside exclusively for the benefit of "native Hawaiians" or for any other of the possible

uses. *See* Hawaii Admission Act § 5(f), 73 Stat. 4 (1959) ("Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide."). Indeed, from 1959 to 1978, the State administered these lands in a race-neutral manner, allocating them principally to the support of public education. App., *infra*, 5a; 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

Thus, against the backdrop of the race-neutral administration of these trust funds from 1959 to 1978, the court below and respondent have, in effect, taken the position that the State of Hawaii has a compelling interest in engaging in racial discrimination today in order to make up for even-handed treatment of all Hawaiian citizens, regardless of race, in the past. A more bizarre and disturbing interpretation of the Equal Protection Clause is difficult to imagine.

The second presumed interest -- the "perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles'" (App., *infra*, 17a) -- is clearly invalid as well. The proposition that only members of a particular race are well situated to make government policy decisions affecting that race's enjoyment of publicly managed funds finds no support in this Court's jurisprudence and is irreconcilable with the basic premise of the Equal Protection Clause, which is that all citizens, *regardless* of race, have equal rights before the law and an equal opportunity to participate in the governmental decision-making process. Indeed, the Ninth Circuit's recognition of this purportedly "compelling" interest effectively reinvigorates the patently offensive notion, previously put to rest by this Court, that it is legitimate for States to categorize voters based on racial stereotypes. *Cf. Shaw*, 509 U.S. at 647 ("It reinforces the perception that members of the same racial group . . . think alike, share the

same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes.").

Even in cases involving *privately* established racially discriminatory trusts, which in and of themselves do not run afoul of the Equal Protection Clause, this Court has made clear that a State has no legitimate interest in furthering or administering such a trust. *See Pennsylvania v. Board of Dirs. of City Trusts*, 353 U.S. 230 (1957) (state agency violated the Fourteenth Amendment by enforcing racially discriminatory terms of will); *Evans v. Newton*, 382 U.S. 296 (1966) (Fourteenth Amendment forbids city from honoring racially discriminatory provision of private trust creating whites-only park). By the same token, Hawaii cannot possibly be deemed to have a legitimate, let alone compelling, interest in advancing the cause of racial segregation by limiting the right to vote for state officials to members of a particular racial group.

2. Equally problematic is the court of appeals' holding that Hawaii's race-based voting scheme "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties' would be the best way to insure proper management and adherence to the needed fiduciary principles." App., *infra*, 17a. In the first place, that holding conflicts with *Croson*, which held that racial classifications are not narrowly tailored to the attainment of a compelling governmental interest unless the government has previously "carefully examined and rejected race-neutral alternatives" to attain the same end. *Croson*, 488 U.S. at 507. In direct contrast with *Croson*, the court below did not identify or require "any consideration of the use of race-neutral means" (*id.*) to achieve the putative compelling interest of "insur[ing] proper management and adherence to the needed fiduciary principles," nor did it make any effort to explain why that goal could not be achieved through race-neutral means. Given that

ensuring "proper management" and "adherence to . . . fiduciary principles" are goals that OHA shares with innumerable organizations whose leadership is selected by race-neutral means, the court's failure to examine these alternatives is a particularly glaring departure from the approach mandated by this Court in *Croson*.

Even if race-conscious means could be justified in these circumstances, moreover, the OHA voting scheme could not satisfy the narrow tailoring requirement under *Croson*, because it does not achieve the purportedly "compelling" goal identified by the court below: ensuring that "the beneficiaries [are] the same as the voters," App., *infra*, at 17a. As it stands, the majority of OHA-qualified voters -- those racial "Hawaiians" who fail to satisfy the 50 percent blood quantum required to be "native" -- are not in fact beneficiaries of the bulk of OHA's funds. Racial "Hawaiians" with less than 50 percent Hawaiian blood have no rights to the publicly held ceded lands that (by virtue of state law) have been set aside for the exclusive benefit of the more racially pure "native Hawaiians."[9] As in *Croson*, therefore, this racial restriction is significantly overbroad in view of its stated goal, and it therefore fails the narrow tailoring requirement as well. *See Croson*, 488 U.S. at 506.

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[9] According to OHA's own figures, only approximately 39 percent of racial "Hawaiians" (80,953 out of 208,476) pass the 50 percent blood quantum requirement. Native Hawaiian Data Book 1998, table 1.14. In contrast, for the last five years for which figures are available, annual legislative appropriations for OHA (which may be spent to benefit all racial "Hawaiians") have totaled $17,735,147, whereas annual proceeds from the ceded land trust (which benefit "native Hawaiians") have totaled $133,989,270. OHA Biennial Reports, 1993-1994 to 1996-1997.

C. The Decision Below Conflicts With This Court's Equal Protection Jurisprudence By Creating A New Presumption Of Constitutionality To Shelter Race-Based Laws From Challenge

In yet another departure from this Court's equal protection jurisprudence, the court of appeals created a broad new presumption of constitutionality for government-sponsored racial classifications, and announced the hitherto unknown proposition that one racial classification justifies another round of state-sponsored discrimination. These troubling and dangerous new rules of constitutional law are inconsistent with this Court's case law and compel review by this Court.

According to the Ninth Circuit, when a party challenges the constitutionality of one portion of a state-sponsored network of racial classifications, all unchallenged aspects of that network of racial discrimination are subject to a conclusive presumption of constitutionality. App., *infra*, 9a. ("[T]he constitutionality of the racial classification that underlies the trusts and the OHA is not challenged in this case. This means that we must accept the trusts and their administrative structure as we find them, and assume that both are lawful."). The court of appeals cited no authority to support its creation of this new shield for state-sponsored racial discrimination, and there is none. To the contrary, this Court has consistently held that race-based laws are "presumptively unconstitutional," *Bush v. Vera*, 517 U.S. 952, 976 (1996) (internal punctuation omitted); *Shaw*, 509 U.S. at 642-43. The court of appeals' presumption of constitutionality for race-based legislative schemes is squarely inconsistent with these cases.

Compounding its error, the court of appeals relied on its improper presumption to conclude that the racial classification at issue in this case was justified by the unchallenged (and therefore presumptively constitutional) aspects of the OHA statutory scheme. App., *infra*, 9a-10a, 16a. Even leaving aside the improper nature of the presumption itself, this chain of reasoning is plainly impermissible, and is inconsistent with this Court's cases. Indeed, even where a particular form of racial classification is *permitted* by the Constitution (*i.e.*, in the case of private discrimination), this Court has made clear that States may not rely on the constitutionally permissible nature of that classification to engage in further state-sponsored race-conscious action.

In *Pennsylvania v. Board of Dirs. of City Trusts*, for example, this Court held that a state agency violated the Fourteenth Amendment when it enforced the racially discriminatory terms of a private will under which a orphanage for poor white males had been established. 353 U.S. at 231. Similarly, the Court in *Evans v. Newton*, prohibited the city of Macon, Georgia, from honoring a racially discriminatory provision of a will under which the city received a park that was to be used only by whites. 382 U.S. at 301-02. The Court based its decision on "the constitutional ban in the Equal Protection Clause of the Fourteenth Amendment against state-sponsored racial inequality, which of course bars a city from acting as a trustee under a private will that serves the racial segregation cause." *Id.* at 298.

In both of these cases, the underlying discriminatory trust was privately created, and thus did not in itself violate the Constitution. But the Court nonetheless construed the Equal Protection Clause to preclude state actors from furthering that private discrimination in other ways. That interpretation is in direct tension with the approach followed below, under which a purportedly permissible racial classification justifies a further round of additional racial discrimination by state actors.

The Ninth Circuit's new approach to equal protection jurisprudence is a mandate for judicial toleration of racially discriminatory laws, and flies in the face of this Court's precedents. Further review is essential.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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APPENDIX

Harold F. RICE, Plaintiff-Appellant,

v.

Benjamin J. CAYETANO, Governor of the State of Hawai'i; Mazi K. Hirono, Lieutenant Governor of the State of Hawai'i, Defendants-Appellees.

No. 97-16095

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 5, 1998.

Decided June 22, 1998.

Before JAMES R. BROWNING, BRUNETTI and RYMER, Circuit Judges.

RYMER, Circuit Judge.

Hawaii holds special elections for trustees of the Office of Hawaiian Affairs (OHA), who must be Hawaiian and who administer public trust funds set aside for the betterment of "native Hawaiians" and "Hawaiians," in which only people who meet the blood quantum requirement for "native Hawaiian" or "Hawaiian" may vote.[1] There is a long history behind

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[1] "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples hereafter have continued to reside in Hawaii," and "native Hawaiian" means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands

[Footnote continued on next page]

the use and structure of the public lands trust for the benefit of descendants of the original races inhabiting the Hawaiian Islands, none of which is challenged in this appeal. Rather, we must decide only whether Hawaii may limit those who vote in special trustee elections to those for whose benefit the trust was established.

Harold F. Rice, who is caucasian and not a beneficiary of the trusts administered by OHA's trustees, appeals the district court's summary judgment in favor of Benjamin J. Cayetano, Governor of Hawaii, upholding the voter qualification in a published opinion.[2] *Rice v. Cayetano*, 963 F. Supp. 1547 (D. Haw. 1997). We agree that the franchise for choosing trustees in special elections may be limited to Hawaiians, because Hawaiians are the only group with a stake in the trust and the funds that OHA trustees administer. They have the right to vote as such, not just because they are Hawaiian. For this reason, neither the Fifteenth

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[Footnote continued from previous page]

previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." Haw. Rev. Stat. § 10-2.

2 A brief in support of the state's position was submitted by amici curiae Office of Hawaiian Affairs, State Council of Hawaiian Homestead Associations, Kamehameha Schools/Bishop Estate, Na Pua A Ke Ahi Pauahi, Inc., Association of Hawaiian Civic Clubs, Council of Hawaiian Organizations, Native Hawaiian Bar Association, Native Hawaiian Legal Corporation, Native Hawaiian Advisory Council, Ha Hawaii, Hui Kalai'aina, and Alu Like, Inc.

Amendment nor the Equal Protection Clause precludes Hawaii from restricting the voting for trustees to Hawaiians and excluding all others.

Therefore, as we have jurisdiction under 28 U.S.C. § 1291, we affirm.[3]

I

A

Some history is helpful by way of background.[4]

Hawaii was an independent kingdom from 1810 until 1893 when it was overthrown and replaced by a provisional government (the Republic of Hawaii) that sought annexation to the United States. The United

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3 Although neither party addresses standing, it is a threshold question that we must consider even if not raised in the district court or on appeal. *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 230-31, 110 S. Ct. 596, 107 L. Ed. 2d 603 (1990); *McMichael v. County of Napa*, 709 F.2d 1268, 1269 (9th Cir. 1983). While Rice may have only a generalized interest in the affairs of OHA and its trustees, he appears to be an adequately injured party as a caucasian resident of Hawaii who allegedly is denied the right to vote on racial grounds in a statewide election. *See, e.g., Baker v. Carr*, 369 U.S. 186, 206-08, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962) (asserted injury to fundamental right to vote deemed a sufficient personal stake to support standing).

4 We realize that the historical facts are not without controversy or complexity. We can't begin to set them all out, nor can we even be sure that every fact we recite is not misleading without further explanation. However, this appeal does not turn on any single historical fact, and our intention is simply to recite enough history to give context to the dispute that we do have to decide.

States accepted the cession of sovereignty of Hawaii in the Annexation Act of 1898. 30 Stat. 750 (1898). As a result, roughly 1,800,000 acres of crown, government, and public lands were ceded to the United States. The Annexation Act provided, however, that all revenues from the public lands were to "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." *Id.* The Organic Act, passed in 1900, established the Territory of Hawaii and confirmed that the public lands ceded to the United States would remain in the possession of the government of the Territory for public works and other public purposes. Organic Act § 91, 31 Stat. 141 (1900), reprinted in, 1 Haw. Rev. Stat. at 84 (1993).

In 1920, the Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921), *reprinted in*, 1 Haw. Rev. Stat. at 191 (1993), set aside some 200,000 acres of public lands as "available lands" for nominal price leases to "native Hawaiians. HHCA § 203. The term "native Hawaiian" was defined to mean "any descendent of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7). HHCA responded to the fact that the number of full-blooded Hawaiians was decreasing and that the Hawaiian race required rehabilitation by being returned to the land. H.R. Rep. No. 839, 66th Cong., 2nd Sess. at 4 (1920). Accordingly, it specified that the trust was to be administered on behalf of the native Hawaiian beneficiaries of the Act. HHCA § 101(c).

Hawaii was admitted to the union as a state in 1959. Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, *reprinted in*, 1 Haw. Rev. Stat. at 90 (1993). In connection with admission, Hawaii agreed as a compact with the United States to adopt the HHCA, including its definition of native Hawaiians, as part of the state Constitution. Admission Act § 4. Article XII, § 1 of the Hawaii Constitution accomplished this. Further, the Admission Act provided that public lands held by the

United States that were granted or conveyed to Hawaii pursuant to § 5(b) were to be held by Hawaii as a public trust for five purposes, one of which is "the betterment of the conditions of native Hawaiians."[5] Admission Act § 5(f). The other four purposes pertain to the public generally.[6]

As it happens, no benefits actually went to native Hawaiians until the state constitution was amended in 1978 to establish the Office of Hawaiian Affairs. OHA was created to hold title to § 5(b) property (except for HHCA "available lands," which are separately administered by the Department of Hawaiian Home Lands) in trust and manage it for native Hawaiians and

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5 Section 5(f) provides that the lands granted to the State of Hawaii by the Admission Act, together with proceeds and income,

> shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use.

Admission Act, § 5(f).

6 In accordance with the Admission Act, the Hawaii Constitution declared that "[t]he lands granted to the State of Hawaii by Section 5(b) of the Admission Act ... excluding therefrom lands defined as 'available lands' by ... the [HHCA] ... shall be held by the State as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4.

Hawaiians.[7] Haw. Const. art. XII, § 5. OHA administers for native Hawaiians a pro rata share (now twenty per cent) of the public lands trust that was created under § 5(f) of the Admission Act.[8] *See* Haw. Con. art. XII, §§ 4, 6; Haw. Rev. Stat. §§ 10-3(1), 10-13.5. It also administers appropriated funds for Hawaiians. Haw. Rev. Stat. § 10-3(2). Pursuant to the constitution and statutes enacted to implement it, OHA is governed by a board of trustees whose members must be Hawaiian and who are elected in special elections by qualified voters who are Hawaiian. Haw. Rev. Stat. §§ 13D-1, 13D-2, 13D-3(b)(1), 13D-4.

B

Rice was born and has always lived in Hawaii. While he traces his ancestry to two members of the legislature of the Kingdom of Hawaii, prior to the Revolution of 1893, Rice is caucasian and is not within the statutory definition of Hawaiian or native Hawaiian. *See* Haw. Rev. Stat. § 10-2.

In March 1996, Rice applied to vote in the August 1996 election for trustees of OHA. The registration form contained the following declaration: "I am also

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7 The purposes of OHA are the betterment of conditions of native Hawaiians and Hawaiians, serving as the principal agency responsible for the performance, development, and coordination of programs for native Hawaiians and Hawaiians, assessing policies of other agencies impacting on native Hawaiians and Hawaiians, and applying for, receiving, and disbursing grants for native Hawaiian and Hawaiian programs and services. Haw. Rev. Stat. § 10-3.

8 The other four purposes for the § 5(f) trust have no allocated pro rata percentage, nor is the remaining revenue administered by OHA.

Hawaiian and desire to register to vote in OHA elections." Rice crossed off the phrase "am also Hawaiian and" and marked "yes" on the application. He is otherwise a qualified voter, but his application was denied since he is not Hawaiian.

Rice brought this action pursuant to 42 U.S.C. § 1983 challenging his exclusion from voting for OHA trustees on the grounds that conditioning eligibility on being Hawaiian violates the Voting Rights Act of 1965 as amended (42 U.S.C. §§ 1971 *et seq.*),[9] 42 U.S.C. § 1981, and the Fourteenth and Fifteenth Amendments of the United States Constitution. The district court concluded that the method of electing OHA trustees meets constitutional standards for the essential reason that the restriction on the right to vote is not based upon race, but upon a recognition of the unique status of native Hawaiians that bears a rational connection to Hawaii's trust obligations. In any event, the court noted, OHA performs no truly governmental functions and "is carefully constrained by its overall purpose to work for the betterment of Hawaiians." 963 F. Supp. at 1558. Having already disposed of other claims, the court entered summary judgment. Rice timely appealed.

II

Rice complains about the "extraordinary" authority and discretion that OHA, which is a state agency, is given to provide government services to a segment of the population defined exclusively by race, funded by a twenty percent share of revenues from the public lands trust which may lawfully be applied for the benefit of all people of the state without regard to race, and run by

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9 Rice has abandoned his claims under the Voting Rights Act and § 1981.

trustees who are voted into office by an electorate apportioned on a purely racial basis. He submits that the racial restriction on the right to vote violates the Fifteenth Amendment because it conditions the right to vote in statewide elections for trustees on membership in the Hawaiian race. It violates the Fourteenth Amendment, according to Rice, because this classification by race, and the corresponding racial restriction on the franchise, fails the test of strict scrutiny which must be applied to all distinctions based on race under *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). And, he contends for the first time on appeal, it also violates the anti-nobility prohibitions of the United States Constitution because it establishes immutable classes among citizens, giving some greater entitlement to political power than others, based solely on birth and ancestry.

Hawaii, on the other hand, emphasizes that neither the definition of native Hawaiians or Hawaiians, nor the designation of specific public lands for their benefit, nor OHA, nor its purposes, is at issue. That being so, it contends, the limitation of the right to vote for OHA trustees to Hawaiians and native Hawaiians is not a racial classification, but a legal one based on who are beneficiaries of the trusts in a special purpose, disproportionate impact election of the sort described in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973). In any event, Hawaii points out, it did not intentionally discriminate on the basis of race because the genesis of the whole structure was Congress's requirement that the new state of Hawaii accept the definition of native Hawaiian in the HHCA and accede to the purposes of the § 5(f) trust which include, in part, betterment of the conditions of native Hawaiians. Finally, the state submits, its classification survives rational basis review (which is the appropriate standard) under *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474,

41 L. Ed. 2d 290 (1974), because the federal government and the state of Hawaii have the same special relationship with and owe the same unique obligation to native Hawaiians as the federal government does to Indian tribes.

Rice counters Hawaii's argument that the right to vote merely reflects the legal status of native Hawaiians and Hawaiians by pointing out that the legal status of being a beneficiary of the OHA trusts is based only on race. That may be so, but the constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case.[10] This means that we must accept the trusts and their administrative structure as we find them, and assume that both are lawful.[11]

If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or

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10 In this connection, we note that the scholarly work upon which Rice relies–and others that we nave read–focuses on the underlying arrangement and its constitutionality, not on the voting rights provision at issue here. *See* Stuart M. Benjamin, *Equal Protection and the Special Relationship*, 106 Yale L.J. 537 (1996); *see also* Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. Haw. L. Rev. 63 (1985).

11 We express no opinion on the constitutionality of the underlying trust structure, or of OHA's purposes, because we are not called upon to determine the constitutionality of any of the racial classifications in the HHCA or the Admission Act or the Hawaii Constitution or the statutes establishing OHA–except for the one provision in Article XII, Section 5 of the Constitution and Haw. Rev. Stat. § 13D-3, limiting the right to vote for OHA trustees, that are directly challenged here.

appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty,[12] should be the group to decide who the trustees ought to be. Put another way, the voting restriction is not primarily racial, but legal or political. Thus, we conclude that Rice's argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

A

Specifically with respect to the Fifteenth Amendment,[13] Rice maintains that Hawaii has created a racially pure voting bloc which states cannot do for any reason under *Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (1960). Moreover, he points out, the Fifteenth Amendment is self-executing and absolute on its face. Since the voter qualification is expressly racial, and absolutely denies the right to vote to all races except the Hawaiian race, Rice contends that it violates the plain meaning of the Fifteenth Amendment without need for farther inquiry. *Shaw v.*

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12 Haw. Rev. Stat. § 10-16(c), for example, provides that "[i]n matters of misapplication of funds and resources in breach of fiduciary duty, board members shall be subject to suit brought by any beneficiary of the public trust entrusted upon the office."

13 The Fifteenth Amendment provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1.

Reno, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993).

Rice is, of course, quite right that the Hawaii Constitution and Haw. Rev. Stat. § 13D-3 contain a racial classification on their face. The Hawaii Constitution provides in Article XII, section 5: "There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law." And § 13D-3, implementing it, provides that: "No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian." Haw. Rev. Stat. § 13D-3(b).

Yet restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for. As the district court explained in detail, 963 F. Supp. at 1556-57, the vote is for the limited purpose of electing trustees who have no general governmental powers and perform no general governmental purposes.[14] The

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14 OHA trustees have power to manage proceeds and income from whatever source for native Hawaiians and Hawaiians, including § 5(f) revenue; to exercise control over property set aside to OHA for native Hawaiians and Hawaiians; to handle money and property on behalf of OHA; to formulate policy relating to the affairs of native Hawaiians and Hawaiians; to provide grants for pilot projects; and to make available technical and financial assistance and advisory services for native Hawaiian and Hawaiian programs. Haw. Rev. Stat. § 10-5. The duties of the board are similarly channeled. They are to develop a master plan for native Hawaiians and Hawaiians; to assist in development of other agencies' plans for native Hawaiian and Hawaiian programs and services; to maintain an inventory of, and act as clearinghouse for,

[Footnote continued on next page]

voting restriction itself applies only at a special election to elect members of the OHA board;[15] in general elections, all persons generally qualified to vote may vote. In these respects the trustee elections are like the special purpose elections upheld in *Salyer Land Co. v. Tulare Water Dist.*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973) and *Ball v. James*, 451 U.S. 355, 101 S. Ct. 1811, 68 L. Ed. 2d 150 (1981). In both cases, the system for electing directors of special purpose water districts limited voting eligibility to landowners on a proportional basis, excluding others in the district. The Court concluded that by virtue of their limited purpose, including the districts' lack of normal governmental authority, and the disproportionate effect of their activities on landowners as a group, the districts' electoral scheme comported with the Fourteenth Amendment and did not run afoul of the popular election requirements set out in *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964). Thus, elections may be held for special purposes and voter qualifications that might otherwise be invalid may survive when they limit eligible voters to those who are disproportionately affected and the government agency does not perform fundamentally governmental functions.

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programs for native Hawaiians and Hawaiians; to keep other agencies informed about native Hawaiian and Hawaiian programs; and to conduct research, develop models for programs, apply for and administer federal funds and promote the establishment of agencies to serve native Hawaiians and Hawaiians. Haw. Rev. Stat. § 10-6.

15 Section 13D-4 provides that "[m]embers of the board of trustees shall be elected at a special election held in conjunction with the general election in every even-numbered year." Haw. Rev. Stat. § 13D-4.

Rice nevertheless asks us to dismiss the *Salyer* rationale entirely on account of OHA's authority over funds that include a twenty percent share of revenues from the ceded lands trust; the similarity between what OHA does for its beneficiaries and what the state otherwise does generally for all citizens without regard to race; and the fact that OHA activities are of vital concern to all citizens of Hawaii. But we cannot set *Salyer* aside altogether, for Rice's points reflect frustration with OHA–which is something we can do nothing about in this case. Whether or not the frustration–or OHA–is justified, the fact remains that public lands and funds have long since been committed in trust, and continue to be allocated in part, for the purpose of benefiting the Hawaiian peoples; they are the only peoples legally interested in how those funds are handled; and for them to decide who should administer the trust does not seem exceptionable under *Salyer* except for the fact, which we recognize, that the qualification has to do with race instead of ownership of land, as in *Salyer*. For this reason we do not regard *Salyer* as dispositive, but we cannot say that it has no applicability whatever.

Nor may we ignore the reality that the voting restriction for trustees is rooted in historical concern for the Hawaiian race, going back at least to the Hawaiian Homes Commission Act of 1920, carried through statehood when Hawaii acknowledged a trust obligation toward native Hawaiians as a condition of admission to the union, and on to 1993, when Congress passed a Joint Resolution "apologiz[ing] to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination." Pub. L. 103-150, 107 Stat. 1510 (1993). In this sense, the special treatment of Hawaiians and native Hawaiians reflected in establishment of trusts for their benefit, and the creation of OHA to administer

them, is similar to the special treatment of Indians that the Supreme Court approved in *Morton v. Mancari*, 417 U.S. 535, 554, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). As we said of *Mancari* in *Alaska Chapter, Associated Gen. Contractors v. Pierce*, 694 F.2d 1162 (9th Cir. 1982), preferential treatment that is grounded in the government's unique obligation toward Indians is a political rather than a racial classification, even though racial criteria may be used in defining eligibility. *Id.* at 1168 n.10. While we recognize that *Mancari* is distinguishable because Hawaiians are not exactly like Indians (for example, they aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution),[16] and we do not regard either *Mancari* or *Pierce* as controlling,[17] both indicate that we are not compelled to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it.

Accordingly, even though there is little authority to guide application of the Fifteenth Amendment in a case

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16 Rice makes the additional point that whatever the historic obligation may have been, it ran to "native Hawaiians" and not to persons of any Hawaiian ancestry as the OHA statute prescribes. Again, this may be so since the definition of beneficiaries was changed in the 1978 constitutional amendments to include "Hawaiians" as well as "native Hawaiians," but it is immaterial to this appeal because the underlying classification is not at issue.

17 Although we questioned *Mancari's* continuing vitality in light of *Adarand* in *Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997), and Rice believes *Adarand* trumps both, we are bound by Supreme Court authority and our own precedent until overruled, which neither *Mancari* nor *Pierce* has been.

such as this, we are persuaded that no violation exists. The Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote," Laurence H. Tribe, *American Constitutional Law*, at 335 n.2 (2d ed. 1988), and renders inoperative any provision of a state constitution that restricts the right to suffrage to members of a particular race, *see Neal v. Delaware*, 103 U.S. 370, 389, 26 L. Ed. 567 (1881), but this isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis. Further, the voter qualification at issue here–albeit clearly racial on its face–does not exclude those who ever had, now have, or ever can have any interest in the outcome of the special election for trustees (at least not unless and until the whole trust scheme and administrative structure is invalidated). Under these circumstances, to permit only Hawaiians to vote in special elections for trustees of a trust that we must presume was lawfully established for their benefit does not deny non-Hawaiians the right to vote in any meaningful sense. The special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity. *Cf., e.g., Lane v. Wilson*, 307 U.S. 268, 59 S. Ct. 872, 83 L. Ed. 1281 (1939) (striking down, under the Fifteenth Amendment, procedural hurdles to registering to vote in general elections); *Smith v. Allwright*, 321 U.S. 649, 64 S. Ct. 757, 88 L. Ed. 987 (1944) (state cannot set racial qualifications for primary because the right to vote in a primary is like the right to vote in a general election). Nor does the limitation in these circumstances suggest that voting eligibility was designed to exclude persons who would otherwise be interested in OHA's affairs. *Cf., e.g., Gomillion v. Lightfoot*, 364 U.S. 339, 81 S. Ct. 125, 5 L. Ed. 2d 110 (gerrymandering city boundary to deny a vote to African-Americans who lived in the city and otherwise would have had the right to vote in municipal elections,

without any countervailing municipal function the scheme was designed to farther). Rather, it reflects the fact that the trustees' fiduciary responsibilities run only to native Hawaiians and Hawaiians and "a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles."[18] The challenged part of Hawaii law was not contrived to keep non-Hawaiians from voting in general, or in any respect pertinent to their legal interests. Therefore, we cannot say that Rice's right to vote has been denied or abridged in violation of the Fifteenth Amendment.

B

Regardless, Rice argues, the racial restriction on the right to vote for OHA trustees violates the Fourteenth Amendment[19] even if the Fifteenth Amendment isn't

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18 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644. The Committee reporting on Section 5, establishing OHA, further noted that trustees should be so elected because "people to whom assets belong should have control over them.... The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." *Id.*

19 Section 1 of the Fourteenth Amendment provides:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

[Footnote continued on next page]

applicable. *Shaw* indicates that racial classifications on the face of a statute are immediately suspect, he emphasizes, and the classification here cannot survive for lack of any compelling justification under *Adarand*.

We obviously agree that there is a racial classification on the face of § 13D-3, and that it is suspect as such; but we disagree for the reasons we have already explained that it is primarily racial in context. Nor is the eligibility requirement, strictly speaking, a preference of the sort that concerned the Court in *Adarand*. Instead, it is more like the limitation of voting to landowners in *Salyer*. We have no trouble understanding why Hawaii would want the people who have an interest in the trust to vote for trustees, and it is rational for the state to make this decision in light of its trust responsibilities for Hawaiians and native Hawaiians. *See Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290; *Pierce*, 694 F.2d 1162. However, even if the voting restriction must be subjected to strict judicial scrutiny because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there–which is not challenged in this appeal. Thus, the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on voter eligibility is precisely tailored to the perceived value that a board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." 1 Proceedings of the Constitutional

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> deny to any person within its jurisdiction the equal protection of the laws.

Convention of Hawaii of 1978, Standing Comm. Rep. No. 59 at 644.

Given the fact that only Hawaiians and native Hawaiians are trust beneficiaries, there is no race-neutral way to accord only those who have a legal interest in management of trust assets a say in electing trustees except to do so according to the statutory definition by blood quantum which makes the beneficiaries the same as the voters. We therefore conclude that because Hawaiians and native Hawaiians have the right to vote as such, not just because they are Hawaiian, that the Equal Protection Clause does not preclude Hawaii from restricting the voting for trustees to Hawaiians and excluding all others.

III

We decline to consider Rice's argument that the restriction on voting to descendants of pre-1778 inhabitants violates the Anti-Nobility Clauses of the United States Constitution because the issue is raised for the first time on appeal. *United States v. Patrin*, 575 F.2d 708, 712 (9th Cir. 1978).

AFFIRMED.

Harold F. RICE, Plaintiff,

v.

Benjamin J. CAYETANO, Governor of the State of Hawai'i, Defendant.

CIV. No. 96-00390 DAE.

United States District Court, D. Hawai'i.

May 6, 1997.

ORDER DENYING PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT; GRANTING DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT

DAVID ALAN EZRA, District Judge.

On February 26, 1997, Plaintiff Harold Rice filed for partial summary judgment on his remaining claim that the voting requirements for elections for the Trustees of the Office of Hawaiian Affairs violate the Constitution and the laws of the United States. On February 28, 1997, Defendant Benjamin Cayetano, Governor of the State of Hawaii, filed for partial summary judgment on the same issue. The court heard argument on these motions on April 28, 1997. John Goemans, Esq., appeared on behalf of Plaintiff; Deputy Attorney General Lynette Matsushima appeared on behalf of Defendant. After reviewing the motions and the supporting and opposing memoranda, the court DENIES Plaintiff's Motion for Partial Summary Judgment and GRANTS Defendant's Motion for Partial Summary Judgment.

BACKGROUND

Plaintiff Harold Rice ("Plaintiff") brought the instant action challenging his exclusion from voting for the Trustees of the Office of Hawaiian Affairs and from

voting in the Special Election ("Native Hawaiian Sovereignty Election") held August 1996. This court has previously addressed Plaintiff's challenge to his exclusion from participating in the Native Hawaiian Sovereignty Election. *Rice v. Cayetano*, 941 F. Supp. 1529 (D. Haw. 1996).

The pertinent facts are undisputed. Plaintiff was born and currently lives in Hawaii as a citizen, taxpayer and qualified elector of the United States, the State of Hawaii, and the County of Hawaii. He traces his ancestry to two members of the legislature of the Kingdom of Hawaii, prior to the Revolution of 1893. Plaintiff, however, is Caucasian and is not within the definition of Hawaiian or Native Hawaiian.[1]

The Office of Hawaiian Affairs ("OHA") was established in 1978 by the Constitutional Convention and the voters of Hawaii for the purpose of establishing an office to address the needs of "the aboriginal class of people of Hawaii," as a means to satisfy the State's responsibility under the Admission Act to utilize the public lands trust for the betterment of Native

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[1] Hawaiians are defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." HRS § 10-2. Native Hawaiians are defined as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii." *Id.*

Hawaiians. HRS §§ 10-1, 10-3. OHA is funded partly by legislative appropriations and partly by a pro rata portion of the receipts from the public lands trust created by the Admission Act. HRS §§ 10-13, 10-13.5. OHA is governed by a board of trustees who must be Hawaiian. HRS § 13D-1. Only Hawaiians and Native Hawaiians may participate in the election for the OHA trustees. HRS § 13D-3.

In March 1996, Plaintiff applied to vote in the election for the Trustees of the Office of Hawaiian Affairs. The registration form contained the following declaration: "I am also Hawaiian and desire to register to vote in OHA elections." Plaintiff deleted the phrase "am also Hawaiian and" and marked "yes" on the application. Plaintiff's application was subsequently denied.

Plaintiff now seeks a declaration that this election premises the right to vote upon racial qualifications, and therefore violates the Fourteenth Amendment and the Fifteenth Amendment of the United States Constitution.

STANDARD OF REVIEW

Fed. R. Civ. P. 56(c) provides for summary judgment when:

> ... the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The movant bears the initial burden of "identifying ... those portions of the material on file that it believes demonstrates the absence of any genuine issue of material fact." *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23, 106 S. Ct. 2548, 2552-53, 91 L. Ed. 2d 265 (1986)). If

the movant has met its burden, then "the non-moving party must show that there are 'genuine factual issues that properly can be resolved only by a finder of fact because they may reasonably be in favor of either party.'" *California Architectural Bldg. Prod. v. Franciscan Ceramics*, 818 F.2d 1466, 1468 (9th Cir. 1987) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249-51, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202 (1986)), *cert. denied*, 484 U.S. 1006, 108 S. Ct. 698, 98 L. Ed. 2d 650 (1988). When the "evidence" produced by each side conflicts, "the judge must assume the truth of the evidence set forth by the opposing party with respect to that fact." Inferences from the facts, disputed and undisputed alike, must be drawn in the light most favorable to the opposing party. *T.W. Elec.*, 809 F.2d at 631. These genuine factual issues must be supported by significant probative evidence. *Commodity Futures Trading Comm'n v. Savage*, 611 F.2d 270, 282 (9th Cir. 1979). Hence, the non-moving party may not stand on its pleadings or merely assert it will controvert the movant's evidence at trial. *See T.W. Elec.*, 809 F.2d at 630. Simple disagreement about a material issue of fact, therefore, no longer precludes the use of summary judgment. *California Architectural Bldg. Prod.*, 818 F.2d at 1468.

DISCUSSION

Plaintiff and Defendant each move for partial summary judgment on the issue of whether the election for the Board of Trustees of OHA violates the Fourteenth and Fifteenth Amendments by restricting the franchise to those of Hawaiian ancestry.[2]

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2 Plaintiff's Complaint only challenges the constitutionality of Article XII, § 5 of the State Constitution, (establishing OHA) and § 13D of the Hawaii Revised Statutes (specifying that

[Footnote continued on next page]

I. Restriction on Franchise

Plaintiff argues that the restriction on his right to vote is based purely on racial classifications and is therefore violative of the Fourteenth[3] and Fifteenth[4] Amendments. Plaintiff maintains that Native Hawaiians are a racial rather than political group. Moreover, Plaintiff contends that the United States Supreme Court's decision in *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974) is not controlling because Native Hawaiians are not a recognized Indian tribe.

Defendant, on the other hand, relies heavily upon *Morton* as holding that legislation singling out aboriginal peoples for particularized treatment is evaluated using the rational basis test. Defendant argues that Native Hawaiians have a special relationship to the Federal Government which is similar to the historically unique relationship between mainland American Indian tribes and the Federal Government underlying the *Morton*

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persons entitled to vote in OHA election be Hawaiian) to the extent that he is excluded from voting. His Complaint does not specifically challenge the requirement that OHA Trustees be Hawaiian nor does it challenge the funding of OHA.

3 The Fourteenth Amendment provides in relevant part that "[n]o State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."

4 The Fifteenth Amendment provides in relevant part that "[t]he right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

decision. Consequently, Defendant maintains that although Native Hawaiians are not yet a federally recognized tribe or quasi-sovereign tribal entity, the rational basis test is properly applied to the instant situation because the franchise classification is not racial, but political.

In further support, Defendant notes that the Native Hawaiian community is one marked for rehabilitation and special consideration by Congress, *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d 1161 (1982), that the State of Hawaii has a unique obligation to the Native Hawaiian population with fiduciary duties similar to those owed by the federal government to Native Americans, and that the State has a special responsibility to protect traditional rights of access to land for subsistence, cultural and religious purposes. Moreover, Defendant argues that Congress has indicated that Native Hawaiians have a special relationship with the Federal Government paralleling that with Native Americans by grouping Native Hawaiians with Native American groups for various special benefits programs.[5]

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5 Defendant notes the inclusion of Native Hawaiians in the Native American Programs Act of 1974 (42 U.S.C. § 2991 *et seq.*); the American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); the National Museum of the American Indian Act (20 U.S.C. § 80q *et seq.*); the Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*); the National Historic Preservation Act (16 U.S.C. § 470 *et seq.*) and the Native American Languages Act (25 U.S.C. § 2901 *et seq.*) and the promulgation of statutes for the benefit of Native Hawaiians exclusively, including the Native Hawaiian Education Act (20 U.S.C. § 7901 *et seq.*), the Native Hawaiian

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Finally, Defendant contends that the rational basis test has been met. Defendant declares that OHA ensures that Native Hawaiians will receive a direct beneficial interest from the public lands as intended by the Admission Act, thereby fulfilling the State's trust obligations and responsibilities to Native Hawaiians. Defendant maintains that limiting the franchise to those OHA's actions directly affected is rationally related to the governmental interest of fulfilling congressionally imposed trust obligations. Defendant additionally asserts that the interests of those disadvantaged by the classification is minimal.

A. Equal Protection

As a general matter, legislation based upon racial classifications is constitutionally suspect under the Equal Protection Clause and should be reviewed under strict scrutiny. *See Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097, 132 L. Ed. 2d 158 (1995). The Supreme Court has held, however, in the context of Native American Indians, that seemingly race-conscious legislation is valid utilizing the less stringent, rational basis test. *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *see Washington v. Washington State Commercial Passenger Fishing Vessel Assoc.*, 443 U.S. 658, 99 S. Ct. 3055, 61 L. Ed. 2d 823 (1979) (preferential fishing rights); *Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 99 S. Ct. 2529, 61 L. Ed. 2d 153 (1979) (burden of proof in property disputes); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 96 S. Ct. 1634, 48 L. Ed. 2d 96 (1976) (immunity from state taxation); *Fisher v. District Court of Sixteenth*

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Health Care Improvement Act of 1992 (42 U.S.C. § 11701 *et seq.*), and the Hawaiian Homes Commission Act.

Judicial Dist., 424 U.S. 382, 96 S. Ct. 943, 47 L. Ed. 2d 106 (1976) (adoption laws); *Antoine v. Washington*, 420 U.S. 194, 95 S. Ct. 944, 43 L. Ed. 2d 129 (1975) (preferential hunting rights).

B. *Morton v. Mancari*

In *Morton v. Mancari*, 417 U.S. 535, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974), the Supreme Court held that the employment preference for Indians in the Bureau of Indian Affairs did not constitute invidious racial discrimination, but was reasonable and rationally designed to further Indian self-government. In so holding, the Court recognized that "[r]esolution of the instant issue turns on the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." 417 U.S. at 551, 94 S. Ct. at 2483. The "origin and nature of this special relationship" derived from the fact that

> 'in the exercise of war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation ...'

Id. at 552, 94 S. Ct. at 2483 (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715, 63 S. Ct. 920, 926, 87 L. Ed. 1094 (1943)). The Court then stated that "in this historical and legal context," Congress determined that proper fulfillment of its trust obligation required giving the Indians greater control over their own destinies, leading to the preference provision. *Id.* at 553, 94 S. Ct. at 2484.

Focusing on the fact that the preference provision was "an employment criterion reasonably designed to further the cause of Indian self government and to make the BIA more responsive to the needs of its constituent groups," and was applied not to Indians as a discrete racial group but as members of quasi-sovereign tribal entities whose lives were governed by the BIA in a unique fashion, the Court concluded that the preference provision was not a "racial preference." *Id.* at 553-54, 94 S. Ct. at 2484. The Court concluded that legislation singling out Indians for special treatment was valid as long as the special treatment could be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. *Id.* at 555, 94 S. Ct. at 2485.

C. Native Hawaiians

Hawaii was an independent kingdom recognized by the United States from 1826 until 1893. Apology Bill, Joint Resolution, Pub. L. No. 103-150, 107 Stat. 1510 (November 23, 1993). In 1893, the monarchy was overthrown and replaced by a Provisional Government (which subsequently declared itself the Republic of Hawaii), which sought annexation to the United States. *Id.* In 1898, by the Newlands Resolution, Congress accepted the cession of the sovereignty of Hawaii and of 1,800,000 acres of lands. *Id.* In 1900, President McKinley signed the Organic Act that provided a government for the Territory of Hawaii and defined the political structure and powers of that government. *Id.*

In 1920, in response to the fact that the number of full-blooded Hawaiians was decreasing and that the race was "fast becoming a minority element" in Hawaii, Congress enacted the Hawaiian Homes Commission Act ("HHCA"). H.R. Rep. No. 839, 66th Cong., 2nd Sess. 2 (1920). The legislative history of the Act, containing testimony from the hearings, describes the Native Hawaiians as "our wards" and the Congress as "trustees." *Id.* at 4; *see Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 336, 640 P.2d

1161, 1167 (1982). Moreover, testifying before the House Committee, Ex-Secretary of the Interior Franklin Lane described Native Hawaiians as

> a most lovable people, a kindly people, and a generous people. They have arts of their own which endear them to the people who visit the islands. It is not altogether the beauty of the islands that attracts people there. It is the spirit that they see and the old civilization that they meet. There is a thriftlessness among those people that is characteristic among peoples that are raised under a communist or feudal system. They do not know what the competitive system is and they will get rid of property that is given them ... Therefore, they should be given as close identification with their country *as is* possible and yet be protected against their own thriftlessness and against the predatory nature of those who wish to take the land from them, and who have in the past.

H.R. Rep. No. 839, 2 *Sess*. at 4. The HHCA set aside certain public lands to be considered Hawaiian home lands to be utilized in the rehabilitation of Native Hawaiians.

In 1959, Hawaii was admitted to the union as the 50th State. Admission Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 ("Admission Act"). In conjunction with admission, the State of Hawaii made a compact with the United States to adopt the HHCA as part of its state constitution. *Id.* § 4.

Section 5(b) of the Admission Act granted Hawaii "title to all the public lands and other public property within the boundaries of the State of Hawaii," including the "available lands" set out in the HHCA. *Id.* These lands granted under § 5(b) are to be held as a public trust for the following purposes: for the support of the public schools and other public educational institutions, for the betterment of the conditions of Native Hawaiians, as defined in the HHCA, for the development of farm and

home ownership, for the making of public improvements, and for the provision of lands for public use. *Id.* § 5(f).

In accordance with the Admission Act, Hawaii amended its constitution and declared that "[t]he lands granted to the State of Hawaii by section 5(b) of the Admission Act ... excluding therefrom lands defined as available lands' by ... the [HHCA] ... shall be held by the State as a public trust for native Hawaiians and the general public." Haw. Const. art. XII, § 4.

In 1978, the state constitution was amended to create the Office of Hawaiian Affairs, to be funded with 20% of the proceeds from the public trust created under § 5(f) of the Admission Act and legislative allocations. Chapter 10 of the Hawaii Revised Statutes provides the duties and responsibilities of OHA, and Chapter 13 provides that OHA's Board of Trustees be Hawaiians voted on by Hawaiians.

D. Application

The cases following *Morton*[6] repeatedly focus upon the special relationship between the Indians and the federal Government, specifically the Government's "unique obligation" toward Indians. *See County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 253, 105 S. Ct. 1245, 1261, 84 L. Ed. 2d 169 (1985); *Washington v. Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n. 20, 99 S. Ct. 3055, 3068 n.20, 61 L. Ed. 2d 823 (1979); *Washington v.*

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6 In *Morton* itself, the Supreme Court stated "As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." 417 U.S. at 555, 94 S. Ct. at 2485.

Confederated Bands & Tribes of the Yakima Indian Nation, 439 U.S. 463, 500-01, 99 S. Ct. 740, 761-62, 58 L. Ed. 2d 740 (1979); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85, 97 S. Ct. 911, 919, 51 L. Ed. 2d 173 (1977); *Northern Cheyenne Tribe v. Hollowbreast*, 425 U.S. 649, 656, 96 S. Ct. 1793, 1797, 48 L. Ed. 2d 274 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480, 96 S. Ct. 1634, 1644-45, 48 L. Ed. 2d 96 (1976); *Rupert v. Director, U.S. Fish & Wildlife Serv.*, 957 F.2d 32, 34-35 (1st Cir. 1992); *Peyote Way Church of God, Inc. v. Thornburgh*, 922 F.2d 1210, 1215 (5th Cir. 1991). In *Morton*, the Court stated that the origin of this relationship arises from the fact that the Indians were left helpless and dispossessed due to the United States' exercise of its war and treaty powers. 417 U.S. at 552, 94 S. Ct. at 2483-84.

Notably, almost identical expressions were used by Congress in describing the Native Hawaiians during committee discussion of the HHCA. H.R. Rep. No. 839, 66th Cong., 2nd Sess. 4 (1920); *see Ahuna*, 64 Haw. at 336, 640 P.2d at 1167. Section 5(f) of the Admission Act provides further evidence of this relationship; § 5(f) creates both a federal right enforceable under 42 U.S.C. § 1983, *Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Commission*, 739 F.2d 1467, 1472 (9th Cir. 1984) ("*Keaukaha II*"), and a trust obligation that constitutes a compact with the United States, *id. Price v. State of Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985). Further, unlike typical provisions of state law, the trust obligation imposed by § 5(f) is protected from amendment by the state legislature unless the United States has consented to those amendments. Admission Act § 4.

Once Congress has established a trust relationship with an Indian tribe, Congress alone has the right to determine when its guardianship shall cease. *United States v. Nice*, 241 U.S. 591, 598, 36 S. Ct. 696, 697-98,

60 L. Ed. 1192 (1916); *Tiger v. Western Investment Co.*, 221 U.S. 286, 315, 31 S. Ct. 578, 586, 55 L. Ed. 738 (1911); *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 380 (1st Cir. 1975). Despite turning over to the State of Hawaii the lands held for the HHCA and in trust, Congress has not explicitly terminated its trust relationship. *See Keaukaha II*, 739 F.2d at 1472 (though state has responsibility to administer trust under Admission Act, trust obligation is rooted in federal law). The State of Hawaii still must receive Congressional approval for certain amendments to the HHCA. Admission Act § 4.

This court recognizes that Native Hawaiians have not and could not at this time receive formal recognition as an Indian tribe.[7] The court is also acutely aware of the

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[7] As noted in *Rice*, 941 F. Supp. at 1542 n.16, because the administrative procedures to obtain federal recognition excludes aboriginal peoples outside the continental United States, Native Hawaiians are precluded from applying for federal recognition through the acknowledgment process. The court additionally acknowledges that Native Hawaiians could not at this point demonstrate that they constitute an Indian tribe by common law definition first articulated in *Montoya v. United States*, 180 U.S. 261, 266, 36 Ct. Cl. 577, 21 S. Ct. 358, 359-60, 45 L. Ed. 521(1901). Under *Montoya*, a native group has proved sovereign tribal status if it establishes by a preponderance of the evidence that (1) it is a group of Indians of the same or similar race, (2) the group is united in a community, (3) the group is under one leadership or government, and (4) the group inhabits an area of some reasonable definition. *Id.* at 266, 21 S. Ct. at 359-60. A native group must also establish that it is the present day successor to the historic sovereign entity which exercised at least minimal

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fact that it is the exclusive province of Congress to confer "nationhood" status to the Native Hawaiians. But a careful review of the history of formal recognition supports the conclusion that the fact that Native Hawaiians are not at this time recognized tribes is not controlling for purposes of determining the proper standard of review.

Native Hawaiians were incorporated into the United States twenty years after the treaty making era with Native Americans was finished. 25 U.S.C. § 71; *see* William W. Quinn, *Federal Acknowledgment of American Indian Tribes: The Historical Development of a Legal Concept*, 34 Am. J. Legal Hist. 331, 347 (1990) (hereinafter "Quinn") (definition of acknowledged Indian tribes prior to 1871 was essentially those with treaties). After 1871, Congress and the Bureau of Indian Affairs ("BIA") possessed the power to classify the Indian tribes with no treaty relations. Quinn at 347. It was not until 1934, however, in the Indian Reorganization Act, that the term "recognition" was used in a jurisdictional sense; only Indian tribes that were acknowledged would be provided with services and dealt with in trust relationships. *Id.* Moreover, it was not until the 1970's, after two circuit court cases conditioning important tribal rights on federal acknowledgment, *United States v. Washington*, 520 F.2d 676 (9th Cir. 1975), *cert. denied*, 423 U.S. 1086, 96 S. Ct. 877, 47 L. Ed. 2d 97 (1976) and *Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975), that the number of petitions for federal acknowledgment rose dramatically, leading to the

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government functions. *Native Village of Tyonek v. Pucken*, 957 F.2d 631, 635 (9th Cir. 1992).

Department of Interior's decision to formalize the petition and acknowledgment process.

Throughout this entire process, Native Hawaiians were omitted from the acknowledgment system, perhaps in part because Native Hawaiians had already developed their own trust relationship with the Federal Government as demonstrated by the passage of the HHCA and because Native Hawaiians were not being excluded from beneficial legislation in the same manner as unacknowledged mainland United States Indian tribes.

The inclusion of Native Hawaiians in legislation promulgated primarily for the benefit of Native American Indians[8] and the promulgation of legislation solely for the benefit of Native Hawaiians[9] constitutes

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8 Native American Programs Act of 1974 (42 U.S.C. § 2991 *et seq.*); American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); National Museum of the American Indian Act (20 U.S.C. § 80q *et seq.*); Native American Graves Protection and Repatriation Act (25 U.S.C. § 3001 *et seq.*); National Historic Preservation Act (16 U.S.C. § 470 *et seq.*); the Native American Languages Act (25 U.S.C. § 2901 *et seq.*); the Indian Health Care Amendments of 1988 (25 U.S.C. § 1601 *et seq.*); 15 U.S.C. § 637a (Aid to Small Business); 20 U.S.C. § 1106b (Teacher Corps preferences); 38 U.S.C. § 3761 *et seq.* (Native American Veteran Housing Loan Pilot Program); 42 U.S.C. § 3011 (establishing Office for American Indian, Alaska Native, and Native Hawaiian Programs on Aging).

9 Congress has enacted numerous special provisions for the benefit of Native Hawaiians in the areas of health, education, labor, and housing. *See, e.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7901 *et seq.*; the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. § 11701 *et seq.*; 20 U.S.C. § 4441 (Program for Native Hawaiian and Alaska

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further compelling evidence of the continuing guardian-ward relationship between Native Hawaiians and the Federal Government. *See Heckman v. United States*, 224 U.S. 413, 32 S. Ct. 424, 56 L. Ed. 820 (1912) (holding when the federal government enters into a treaty or enacts a statute on behalf of an Indian tribe, Government commits itself to a guardian ward relationship with that tribe); *United States v. Kagama*, 118 U.S. 375, 6 S. Ct. 1109, 30 L. Ed. 228 (1886) (same); *Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 8 L. Ed. 483 (1832) (same).

The *Morton* decision is premised upon the existence of a guardian-ward relationship, and the requirement that the indigenous people be part of a recognized tribe is important as evidence of this continuing relationship. *See Peyote Way Church*, 922 F.2d at 1215 ("[O]nly the constituencies of the quasi-sovereign nations over whom the federal government considers itself guardian enjoy the preference."). As discussed above, there is abundant evidence that the guardian-ward relationship existed, and currently exists, between the federal Government and Native Hawaiians and between the State of Hawaii and Native Hawaiians. As it is the unique guardian-ward relationship that is paramount, not formal recognition, the court finds that *Morton* is equally applicable to Native Hawaiians as to formally recognized Native Americans. *See Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 339, 640 P.2d 1161 (1982) ("Essentially, we are dealing with relationships between the government and aboriginal people. Reason thus

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Native Culture and Arts); 20 U.S.C. § 7118 (allotting money for drug and violence prevention programs); 42 U.S.C. § 254s (Native Hawaiian Health Scholarship); 42 U.S.C. § 3057 *et seq.* (Native Hawaiian Health Program).

dictates that we draw the analogy between native Hawaiian homesteaders and other native Americans."); *see also Naliielua v. Hawaii*, 795 F. Supp. 1009, 1012-13 (D. Haw. 1990) ("Native Hawaiians are people indigenous to the State of Hawaii, just as American Indians are indigenous to the mainland United States.").

The court concludes that the requirements of the Fourteenth and Fifteenth Amendments are not violated because the restriction on the right to vote is not based upon race, but upon a recognition of the unique status of Native Hawaiians. This classification derives from the trust obligations owed and directed by Congress and the State of Hawaii. Consequently, the legislation will be upheld if it can be tied rationally to the fulfillment of the unique obligation to Native Hawaiians. *Morton*, 417 U.S. at 555, 94 S. Ct. at 2485.

E. Application of Rational Basis Test

Plaintiff argues that there is no rational connection between the State's faithful execution of its trust obligation to Native Hawaiians and the race of electors for OHA. In so arguing, Plaintiff contends that the trust established by the Admission Act is not a trust for Native Hawaiians exclusively because the statute merely lists the "betterment of the condition of native Hawaiians" as a permissible use of the ceded lands. Plaintiff maintains that instead, all the State's residents are beneficiaries of the entire trust. Finally, Plaintiff argues that supporting self-determination or self-government for Native Hawaiians is not a compelling state interest.

Defendant enumerates the following reasons as justification for the franchise restriction: (1) Hawaiians enjoy a unique status as Native Americans or aboriginal peoples and special legislation for them meets equal protection requirements under *Morton*, (2) restriction of the franchise allows Hawaiians greater access to participation in matters directly affecting them,

furthering the state's trust obligation toward the betterment of the conditions of Native Hawaiians, reducing the negative impact of having non-Hawaiians administer matters that affect programs and activities relating to Native Hawaiians and Hawaiians, and allowing a board of trustees chosen from among those who are directly interested parties in order to ensure proper management and adherence to the needed fiduciary principles, and (3) ceded lands and their proceeds are held in part for the benefit of Hawaiians.

The court has already discussed the obligations imposed upon the State of Hawaii by Congress in the Admission Act. The lands given to the State by § 5(b) of the Admission Act are held in public trust for five specified purposes. The State of Hawaii, to comply with its obligation to perform one of these five purposes, the betterment of Native Hawaiians, created OHA. OHA is given a 1/5 portion of the proceeds from the § 5(b) lands. OHA has authority to spend this money, as well as money received by legislative allocation and other sources, as it believes will fulfill the purpose. The State of Hawaii limited the electoral franchise to those who are to benefit from OHA's programs. This structure is rationally related to the State's responsibility under the Admission Act to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians.

Finally, Plaintiff contends that the State of Hawaii may not create a tribe and invest it with powers of self-government. In support, Plaintiff cites *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 500-01, 99 S. Ct. 740, 761-62, 58 L. Ed. 2d 740 (1979), specifically that

> It is settled that the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive. States do not enjoy this same unique relationship with Indians....

Plaintiff, however, has omitted the second half of this clause, where the Court concludes "but Chapter 36 is not simply another state law. It was enacted in response to a federal measure explicitly designed to readjust the allocation of jurisdiction over Indians." *Id.* at 501, 99 S. Ct. at 761. Similarly, the creation of OHA and the pendent legislation providing qualifications for the office of Trustee and for voting were passed pursuant to the Admission Act.

Moreover, the creation of OHA did not create a "tribe" composed of Native Hawaiians, nor is OHA invested with powers of self-government outside of the Act. Moreover, as discussed in detail above, the State of Hawaii created OHA as a means to fulfill the obligation taken over from the federal government as part of the Admission Act. The State of Hawaii did not create the trust relationship with Native Hawaiians, nor did it enact the initial legislation singling Native Hawaiians out for special treatment. Rather, the State of Hawaii merely enacted a reasonable method to satisfy its obligation to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians. This is clearly consistent with and pursuant to Congress' mandate and intent.

II. One Person/One Vote

Defendant argues further that because OHA was created for a specialized purpose and is vested with very limited governmental authority, the election for the board of trustees of OHA is a "special interest" election within the meaning of *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973). Defendant concludes that restricting the franchise to those disproportionately affected by OHA's actions is constitutional because it is rationally related to the State's fulfillment of its unique obligations to Native Hawaiians and Hawaiians.

As discussed above, the limitation on the electoral franchise is not based upon race. The demands of *Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362, 12 L. Ed. 2d 506 (1964), however, do not apply exclusively to restrictions allegedly based upon race. Rather, *Reynolds, Avery v. Midland County*, 390 U.S. 474, 88 S. Ct. 1114, 20 L. Ed. 2d 45 (1968), and *Hadley v. Junior College District*, 397 U.S. 50, 90 S. Ct. 791, 25 L. Ed. 2d 45 (1970) require strict adherence to the principle of one-person, one-vote in elections. Even in these cases, the Supreme Court has recognized that "there might be some case in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with Reynolds ... might not be required...." *Hadley*, 397 U.S. at 56, 90 S. Ct. at 795.

The Supreme Court found such a case in both *Salyer Land Company v. Tulare Lake Basin Water Storage District*, 410 U.S. 719, 93 S. Ct. 1224, 35 L. Ed. 2d 659 (1973) and *Ball v. James*, 451 U.S. 355, 101 S. Ct. 1811, 68 L. Ed. 2d 150 (1981). In *Salyer*, the Supreme Court upheld a voter qualification statute which restricted voting to landowners and apportioned voting power for directors of the water district upon the assessed valuation of the voting landowner's property. Although the district did exercise some governmental powers, such as the power to hire and fire workers, condemn private property, issue general obligation bonds, and contract for the construction of projects, the Court also noted that this authority was limited because the district's primary purpose was for the acquisition, storage and distribution of water. The Court further recognized that the financial burdens fell on the landowners in proportion to the benefits they received from the district, and that the district's actions therefore disproportionately affected the voting landowners. Based upon these circumstances, the Court applied the rational basis test and concluded that the restrictions were constitutional.

In *Ball*, the Court also upheld the constitutionality of an Arizona method of electing directors for an agricultural improvement and power district which limited voter eligibility to landowners and apportioned voting power based on acreage owned. The Court found that the district did not "exercise the sort of governmental powers that invoke the strict demands of *Reynolds*." *Id.* at 366, 101 S. Ct. at 1818. The Court further described the district's functions as "relatively narrow," noting that the district does not own, sell or buy water, or control the use of the stored water, but instead stores water, conserves it from loss, and delivers it through canals. *Id.* at 367, 101 S. Ct. at 1819. Finally, the Court concluded that the existence and size of the district's power business did not affect the legality of the voting scheme, noting that the provision of electricity is not a traditional element of government sovereignty and that nothing in the prior cases suggests that "the volume of business or the breadth of economic effect of a venture undertaken by a government entity as an incident of its narrow and primary governmental public function can, of its own weight, subject the entity to the one-person, one-vote requirement...." *Id.* at 370, 101 S. Ct. at 1820.

OHA has the statutory purpose to serve as the principal public agency responsible for the performance, development, and coordination of programs and activities relating to Native Hawaiians and Hawaiians, to assess the policies and practices of other agencies impacting on Native Hawaiians and Hawaiians, to conduct advocacy efforts for Native Hawaiians and Hawaiians, to apply for, receive, and disburse grants and donations for Native Hawaiian and Hawaiian programs and services, and to serve as a receptacle for reparations. HRS § 10-3. By statute, OHA is given the following powers: (1) to adopt, amend and repeal bylaws governing the conduct of its business and the performance of its powers and duties; (2) to acquire, to hold, maintain, use, operate, sell, lease any real, personal

or mixed, tangible or intangible property in such manner and to the extent necessary to carry out its purpose; (3) to determine the character of and the necessity for its obligations and expenditures; (4) to enter into and perform such contracts, leases, cooperative agreements; (5) to execute all instruments necessary or appropriate in the exercise of its powers; (6) to issue revenue bonds in such principal amounts as may be authorized by law to finance the cost of an office project as authorized by law; (7) to lend or otherwise apply the proceeds of the bonds issued for an office project; (8) to exercise any and all rights provided by law for entry and re-entry upon or to take possession of an office project; and (9) to take such actions as may be necessary or appropriate to carry out the powers conferred by law. HRS § 10-4.

By statute, the Board of Trustees has the power to manage OHA's financial affairs, formulate policy relating to the affairs of Native Hawaiians and Hawaiians, and provide grants and make available technical and financial assistance for Native Hawaiian and Hawaiian programs. HRS § 10-5. More specifically, Hawaii law specifies that the Board's general duties include developing, implementing and updating a comprehensive master plan for Native Hawaiians and Hawaiians, to assist in the development of state and county plans for Native Hawaiian and Hawaiian programs, to maintain an inventory of available federal, state, county and private programs for Native Hawaiians and Hawaiians, to advise federal, state, and county officials about Native Hawaiian and Hawaiian programs, to conduct research relating to Native Hawaiians and Hawaiians, to develop models for comprehensive Native Hawaiian and Hawaiian programs, to act as a clearinghouse for applications for federal or state assistance to carry out Native Hawaiian or Hawaiian programs, to apply for and administer any federal funds made available for Native Hawaiians and Hawaiians, and to promote and assist the establishment

of agencies to serve Native Hawaiians and Hawaiians. HRS § 10-6.

Plaintiff maintains that OHA provides nearly the entire range of social and governmental services provided by the State of Hawaii to all citizens to a select group defined by race. In support, Plaintiff refers to the OHA publication on its Internet site, "Working for the Betterment of a People." In this publication, OHA states that among its programs and services, it helps provide scholarships for students, loans for businesses, and houses for homesteaders, it advocates for Hawaiian water rights and supports legal efforts for Hawaiians to secure title to their land, speaks on behalf of Hawaiians in Congress, the State legislature, and city and county councils, it supports numerous cultural activities, and its health division works with other agencies to ensure that Hawaiian needs and values are taken into consideration when creating health policy.

In *Board of Estimate of City of New York v. Morris*, 489 U.S. 688, 109 S. Ct. 1433, 103 L. Ed. 2d 717 (1989), the Supreme Court held that New York City's Board of Estimate fell "comfortably within the category of governmental bodies whose 'powers are general enough and have sufficient impact throughout the district' to require that elections to the body comply with equal protection strictures." *Id.* at 696, 109 S. Ct. at 1439 (citations omitted). The Board of Estimate possessed fiscal responsibilities including calculating sewer and water rates, tax abatements, property taxes; managed all city property; fixed the salaries of those paid by city funds; and granted all city contracts. *Id.* at 696, 109 S. Ct. at 1439-40. The Court specifically noted that these powers were not shared by any other part of New York City government. *Id.* The Board additionally possessed considerable authority to formulate the City's budget. *Id.*

In *Ball*, the district had the statutory power to establish and enforce laws, rules and regulations to carry

on its business, to construct works for irrigation, drainage and power, to levy taxes upon real property within the district, to sell tax-exempt bonds, and to exercise the power of eminent domain. *See Smith v. Salt River Project Agricultural Improvement & Power Dist.*, 109 F.3d 586, 1997 WL 129035 (9th Cir. 1997). In determining that the district did not exercise the sort of governmental powers that invoke *Reynolds*, however, the Court noted

> The District cannot impose ad valorem property taxes or sales taxes. It cannot enact any laws governing the conduct of citizens, nor does it administer such normal functions of government as the maintenance of streets, the operation of schools, or sanitation, health, or welfare services. In *Salyer*, we recognized that the powers to contract for and staff projects, to condemn property, and to issue bonds do not amount to such general governmental authority. 410 U.S. at 728 n.8 [93 S. Ct. at 1230 n.8]. And as recognized by the dissenting opinion in the companion case to *Salyer*, the power to levy and collect special assessments also does not create such general governmental authority. *Associated Enterprises, Inc. v. Toltec Watershed Improvement Dist.*, 410 U.S. 743, 749 [93 S. Ct. 1237, 1240, 35 L. Ed. 2d 675] (1973) (Douglas, J.).

Ball, 451 U.S. at 366 & n.11, 101 S. Ct. at 1818 & n.11.

Likewise, OHA does not and cannot impose taxes. It cannot enact laws, nor does it administer the normal functions of government. While OHA does participate in a limited way in the operation of schools, health, and welfare services for the specific benefit of Hawaiians and Native Hawaiians, it does not by any means control the provision of these services to the general population. OHA cannot issue bonds, unless specifically authorized by law to finance the cost of an office project as authorized by law. HRS § 10-4. Moreover, while OHA has broad discretion in the disbursement of its funds, it is

not unfettered; OHA is carefully constrained by its overall purpose to work for the betterment of Hawaiians.[10]

Under these facts, it is clear that OHA, and correspondingly the Board of Trustees, does not exercise the general governmental powers that invoke the demands of *Reynolds*, *Avery*, and *Hadley*.

CONCLUSION

For the reasons stated above, the court concludes that the method of electing OHA Trustees as presently provided by state law meets constitutional standards and therefore, the court DENIES Plaintiff's Motion for Partial Summary Judgment and GRANTS Defendant's Motion for Partial Summary Judgment.

IT IS SO ORDERED.

---

10 The Plaintiff makes much of the pronouncements of one or more elected Trustees. The court, however, must base its decision on the specific contours and limits of OHA's mandate and legal authority. To the extent the Trustees of OHA, or even the state legislature exceed these limits, they risk running afoul of federal law and constitutional boundaries. Such action would be subject to immediate challenge in the federal courts.

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

[August 20, 1998]

HAROLD F. RICE,	)	
	)	No. 97-16095
Plaintiff-Appellant,	)	
	)	D.C. No. CV-96-00390-DAE
v.	)	
	)	
BENJAMIN J. CAYETANO, Governor of the State of Hawaii; MAZIE K. HIRONO, Lieutenant Governor of the State of Hawaii,	)	
	)	
Defendants-Appellees.	)	

Before: BROWNING, BRUNETTI, and RYMER, Circuit Judges

The panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

THE CONSTITUTION OF THE UNITED STATES OF AMERICA

AMENDMENT XIV

Section 1. ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

AMENDMENT XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

THE CONSTITUTION OF THE STATE OF HAWAII

ARTICLE XII: HAWAIIAN AFFAIRS

* * *

PUBLIC TRUST

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

POWERS OF BOARD OF TRUSTEES

Section 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law; to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for

native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Pub. L. 86-3, 73 Stat. 4

HAWAII ADMISSION ACT

* * *

Section 5. ... (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, and to all lands defined as "available lands" by section 203 of the Hawaiian Homes Commission Act, 1920, as amended, within the boundaries of the State of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

* * *

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provisions of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States.

The schools and other educational institutions supported, in whole or in part out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

HAWAII REVISED STATUTES

CHAPTER 10: OFFICE OF HAWAIIAN AFFAIRS

[§10-1] Declaration of purpose.

(a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.

* * *

§10.2 Definitions. In this chapter, if not inconsistent with the context:

* * *

"Hawaiian" means any descendant of the aboriginal people inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided

that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

* * *

§10.3 Purpose of the office. The purposes of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians;

(2) The betterment of conditions of Hawaiians

(3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations.

* * *

§10-4 Office of Hawaiian affairs; established; general powers. There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The

office, under the direction of the board of trustees, shall have the following general powers:

(1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law;

(2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office of Hawaiian affairs;

(4) To enter into and perform such contacts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate;

(5) To execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers; and

(6) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.

* * *

[§10-6] General duties of the board.

(a) The general duties of the board shall be:

(1) To develop, implement, and continually update a comprehensive master plan for native Hawaiians and Hawaiians which shall include, but not be limited to, the following:

(A) Compilation of basic demographic data on native Hawaiians and Hawaiians;

(B) Identification of the physical, sociological, psychological, and economic needs of native Hawaiians and Hawaiians;

(C) Establishment of immediate and long-range goals pursuant to programs and services for native Hawaiians and Hawaiians;

(D) Establishment of priorities for program implementation and of alternatives for program implementation; and

(E) Organization of administrative and program structure, including the use of facilities and personnel;

(2) To assist in the development of state and county agency plans for native Hawaiian and Hawaiian programs and services;

(3) To maintain an inventory of federal, state, county, and private programs and services for Hawaiians and native Hawaiians and act as a clearinghouse and referral agency;

(4) To advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians;

(5) To conduct, encourage, and maintain research relating to native Hawaiians and Hawaiians;

(6) To develop and review models for comprehensive native Hawaiian and Hawaiian programs;

(7) To act as a clearinghouse for applications for federal or state assistance to carry out native Hawaiian and Hawaiian programs or projects;

(8) To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians; and

(9) To promote and assist the establishment of agencies to serve native Hawaiians and Hawaiians.

(b) The board shall have any powers which may be necessary for the full and effective performance and discharge of the duties imposed by this chapter, and which may be necessary to fully and completely effectuate the purposes of this chapter.

* * *

§10-13.5 Use of public land trust proceeds. Twenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians.

* * *

§13D-3 Qualifications of voters; registration.

(a) Every person who registers as required by law shall be entitled to vote at any election of board members provided that the person shall have attained the age of eighteen years at the time of the election.

(b) No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications:

(1) The person is Hawaiian;

(2) The person has attained the age of eighteen years or will have attained such age within one year of the date of the next election of board members; and

(3) The person is otherwise qualified to register to vote in the State.

Supreme Court, U.S.
FILED
DEC 29 1998
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No. 98-818

In The

Supreme Court of the United States

October Term, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner challenges the Hawaii requirement that voters electing trustees of OHA be Hawaiian, but does not challenge the constitutionality of OHA's trust mandate to better the conditions of Hawaiians and native Hawaiians. The Question Presented is:

Whether it is permissible under the Fourteenth and Fifteenth Amendments to allow only those persons who are the beneficiaries of historically-rooted trust obligations – obligations to native Hawaiians and Hawaiians that are unchallenged – to vote for the trustees of the entity created to carry out those trust obligations?

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INTRODUCTION

Petitioner's scare tactic of attempting to paint this case as involving pernicious invidious discrimination akin to "whites-only" racism is appalling. No reasonable person could construe the voter restriction allowing only Hawaiians and native Hawaiians[1] to elect Office of Hawaiian Affairs (OHA) trustees designed to fulfill historically-rooted trust obligations to Hawaiians and native Hawaiians as even approaching anything like "whites-only" type discrimination.

Nor does this case fall within the "affirmative action" type of race-based distinctions subjected to strict scrutiny by *Adarand Constructors, Inc. v. Pena,* 515 U.S. 200 (1995) or *City of Richmond v. J.A. Croson Co.,* 488 U.S. 469 (1989). Those cases simply did not involve the governmental fulfillment of a historically-rooted trust obligation to an aboriginal people; a trust obligation rooted in the desire to assist these people because they were the displaced subjects of a former, but since conquered, independent sovereign. It is because of this unique and critical history, shared by both Indians and Hawaiians and native Hawaiians, that this Court in *Morton v. Mancari,* 417 U.S. 535 (1974), and its progeny, appropriately held that classifications designed to fulfill that vital trust obligation are subjected to mere rational basis review. *Adarand* and *Croson* simply do not address this unique situation. In any event, the Ninth Circuit correctly held that even if

---

[1] The State of Hawaii will use the terms "native Hawaiian" and "Hawaiian" in accord with Hawaii Revised Statutes (HRS) § 10-2, as does petitioner. "Native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. "Hawaiian" means any descendant, even if not one-half part or more.

strict scrutiny were applied, the voting restriction met that test.

Most importantly, this case does *not* even raise the question petitioner attempts to foist upon this Court: whether Hawaii may constitutionally set aside land and money in trust, under the control of OHA, exclusively for the benefit of Hawaiians and native Hawaiians (and in turn whether limiting those who can vote for the OHA trustees to Hawaiians and native Hawaiians is constitutional). Why not? Because as the Ninth Circuit Court recognized, the set aside in trust exclusively for the benefit of Hawaiians and native Hawaiians was *not* challenged in this case, and must be presumed to be constitutional.

Indeed, the record, which was developed for an attack solely upon the voter restriction, does not provide any basis for reviewing the constitutional validity of the underlying trust itself, and petitioner to this day does not and cannot challenge it. Once this is understood, the question in this case boils down to a simple one: whether voters electing OHA trustees to manage property in trust for the exclusive benefit of Hawaiians and native Hawaiians – where the benefiting of those groups exclusively is presumed constitutional – may be similarly limited to the same beneficiary group, Hawaiians and native Hawaiians. The answer to *that* question, which is the only one presented here, is clearly "yes," and does not warrant this Court's review.

STATEMENT OF THE CASE

The issue in this case is whether the voter restriction violates petitioner's rights under the Fourteenth and Fifteenth Amendments when the similarly restricted OHA

administrative structure and underlying trust obligations are not challenged.

1. Proceedings Below.

As to the Fourteenth Amendment, the District court found that the voting restriction was based not upon race but upon recognition of the unique status of native Hawaiians, based on the trust obligations owed and directed by Congress and the State of Hawaii. The court found the restriction rationally related to the fulfillment of the unique obligations to native Hawaiians. As to the Fifteenth Amendment, the court found that the election of OHA trustees qualified as a special purpose election that allowed limiting the electorate.

On appeal, the Ninth Circuit emphasized, and relied heavily upon, the fact that "the constitutionality of the racial classification that underlies the trusts and OHA is not challenged in this case," and that, accordingly, "we must accept the trusts and their administrative structure as we find them, and assume that both are lawful." Petition (Pet.) at 9a.

> If, as we must, we take it as given that lands were properly set aside in trust for native Hawaiians; that the State properly established an Office of Hawaiian Affairs to hold title to, and manage, property set aside in trust or appropriated exclusively for native Hawaiians and Hawaiians; and that OHA is properly governed by a board of trustees whose members are Hawaiian, it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be. Put another way, the voting restriction is not

> primarily racial, but legal or political. Thus, we conclude that Rice's argument fails under both the Fourteenth and Fifteenth Amendments for essentially the same reasons.

Pet. at 9a-10a. The Ninth Circuit, after finding the principles of *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973) (special purpose election), and *Morton* (which requires only a rational basis for Indian preferences to survive equal protection challenge) to be applicable, went on to hold that the voting restriction would survive even strict scrutiny because it serves "the state's compelling responsibility to honor the trust" and "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.' " Pet. at 17a.

2. Historical Facts.

An understanding of the correctness of both lower court decisions requires an understanding of events in Hawaii history relevant to petitioner's claim.

a. The Public Lands

Hawaii was an independent kingdom from 1810 until 1893. The monarchy was overthrown in 1893 and replaced by a provisional government, which declared itself the Republic of Hawaii and sought annexation to the United States. In the Annexation Act of 1898 (also known as the Newlands Resolution), the United States accepted the cessation of the sovereignty of Hawaii. 30 Stat. 750, Act of July 7, 1898. Pet. at 3a-4a.

As a result of the overthrow, loss of sovereignty, and annexation, roughly 1,800,000 acres of crown, government, and public lands from the monarchy were ceded by the Republic of Hawaii to the United States.[2] The Annexation Act provided that all revenues or proceeds of the public lands (except for portions required by the United States) shall "be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Pet. at 4a.

The post-annexation Organic Act established the Territory of Hawaii. 31 Stat. 141 (1900). Pet. at 4a. The Organic Act confirmed that the public lands ceded to the United States by the Annexation Act remained in the possession, use, and control of the government of the Territory of Hawaii for public works and other public purposes. Organic Act §§ 73, 91. Pet. at 4a.

b. The Hawaiian Homes Commission Act, 1920

The Hawaiian Homes Commission Act, 1920, 42 Stat. 108 (1921) ("HHCA"), Appendix (App.) A2-A4, set aside more than 200,000 acres of the public trust lands of the Territory of Hawaii as "available lands" for longterm nominal price leases to native Hawaiians. Pet. at 4a; App. A4. *Congress* defined native Hawaiian as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7); App. A3.

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[2] These events later led to an apology on behalf of the United States for the overthrow of the Kingdom of Hawaii. Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993). Pet. at 13a.

> The bill seeks to rehabilitate the Hawaiian race by placing Hawaiian families back on the land. A considerable portion of the land once known as the "Hawaiian Crown lands" . . . is available for lease to Hawaiians for homestead purposes. . . .
>
> The Hawaiian race is fast declining. Statistics indicate that within the course of a few years the race will become extinct unless some method can be adopted to check the decrease.

H.R. Rep. No. 236 at 1 (1921) (67th Cong. 1st Sess.).

The HHCA available lands are held in trust for the benefit of native Hawaiians. *See Ahuna v. Dept. of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982) (Hawaiian Homes Commission has fiduciary trust obligation benefiting native Hawaiians as aboriginal peoples).

c. The Admission Act

Hawaii was admitted as a state in 1959 by way of the Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959), and presidential proclamation. App. A1. The Admission Act imposed two conditions on statehood that are important to this case.

First, section 4 of the Admission Act establishes a "compact" between the State of Hawaii and the United States concerning the Hawaiian *homelands*. App. A1. Specifically, the "available lands" designated in the HHCA were transferred to the State of Hawaii. The State of Hawaii was required to adopt the HHCA, *including Congress' definition of native Hawaiian*, as part of the Hawaii Constitution. This was done. Haw. Const. art. XII § 1. Pet. at 4a. The State of Hawaii may make administrative changes to the HHCA, but may not without the consent of the United States make substantive changes that

decrease the benefits for native Hawaiians. Admission Act § 4; *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986) (unlike typical provision of state law, trust obligation protected from amendment).

Second, section 5(f) of the Admission Act establishes a public land trust on certain lands (and the proceeds from those lands) granted or conveyed to the State of Hawaii by the United States under sections 5(b) and 5(e).[3] Pet. at 48a. The State of Hawaii holds the section 5(f) trust lands for five purposes. One is *"for the betterment of the conditions of native Hawaiians."* Admission Act § 5(f); *see Price v. Akaka*, 3 F.3d 1220, 1222 (9th Cir. 1993), *cert. denied*, 511 U.S. 1070 (1994). The other four are: 1) for the support of public schools and other public institutions; 2) for the development of farm and home ownership; 3) for the making of public improvements; and 4) for the provision of lands for public use. *Id.*

While section 5(f) identifies the five purposes of the public land trust, it does not explicitly require that all five be supported in any specific proportion. Section 5(f) provides that the trust lands, proceeds and income shall be used "for one or more" of the five purposes "in such manner as the constitution and laws of said State may provide. . . . " Pet. at 48a.

From statehood in 1959 until the 1978 constitutional convention, none of the section 5(f) public trust lands or

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[3] The section 5(b) lands are basically the lands ceded to the United States at annexation (including the lands designated as "available lands" by the HHCA). The section 5(e) lands are lands retained by the United States at statehood and subsequently conveyed to the State of Hawaii, upon a presidential determination that the land is no longer needed by the United States.

monies (apart from the HHCA lands) was used for the betterment of the conditions of native Hawaiians. *See* Pet. at 5a.

d. Office of Hawaiian Affairs

Three amendments to the Hawaii Constitution that are relevant to this case were adopted in 1978. (1) Article XII, Section 4 defines the public land trust as the 5(f) trust lands excluding the HHCA lands and specifically states that native Hawaiians (and the "general public") are beneficiaries of the section 5(f) public trust.[4] The amendment thus makes clear that the section 5(f) purpose of "the betterment of the conditions of native Hawaiians" was *not* satisfied exclusively with the HHCA "available lands" in the section 5(b) lands. Article XII, Section 4 clarifies that native Hawaiians are beneficiaries of the public land trust in addition to whatever benefits they receive from the HHCA "available lands." *See* 1979 *Haw. Sen. J.* 1350, 1351 (Standing Comm. Rept. 784).[5]

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[4] Article XII Section 4, entitled "Public Trust," provides:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the [HHCA], shall be held by the State as a public trust for native Hawaiians and the general public.

[5] The HHCA available lands retain their identity as trust lands separate from the public land trust. *See Price v. Akaka*, 928 F.2d 824, 826 n.1 (9th Cir.), *cert. denied*, 502 U.S. 967 (1991) (public land trust does not include the homelands). The discharge of the State of Hawaii's trust obligations under the HHCA is the responsibility of the State of Hawaii *Department of Hawaiian Home Lands*, and not the responsibility of OHA.

(2) Article XII, Section 5 establishes the Office of Hawaiian Affairs and provides that it shall hold title to all real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. Pet. at 46a. Section 5 also contains the provision challenged in this case that "[t]here shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law."

The committee of the 1978 constitutional convention that drafted this voting provision explained it in terms of trustee accountability to trust beneficiaries:

> Your Committee is unanimously and strongly of the opinion that people to whom assets belong should have control over them. After much deliberation and attention to testimony from all parts of the State, your Committee concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles. . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary. . . .
>
> Finally, the committee agreed that the board should be elected by all the beneficiaries. Certainly they would best protect their own rights. Such a practice is in line with the basic principles of a democratic society.

1 *Proceedings of the Constitutional Convention of Hawaii of 1978*, Standing Comm. Rept. No. 59, 643, 644-45 ("Proceedings"). The 1979 legislature enacted HRS § 13D-3(b), which repeats the requirement that voters for the OHA

board be Hawaiian, and adds other state requirements. Pet. at 54a-55a.

(3) Article XII, Section 6 specifically confers on OHA trustees "the power to manage and administer all income and proceeds from that *pro rata portion of the trust* referred to in [Article XII, Sect. 4] for native Hawaiians. . . . " Pet. at 46a-47a.

The "pro rata portion" of the public land trust for native Hawaiians was not defined by the Admission Act or by any constitutional provision or amendment. In 1980, the legislature set the pro rata portion for native Hawaiians of the revenue from the public land trust at twenty percent. HRS § 10-13.5. Pet. at 54a. None of the other four purposes of the public land trust has an allocated pro rata percentage.

e. OHA Duties

The members of the OHA board serve as trustees for the twenty percent of the revenue of the public land trust established by § 5(f) of the Admission Act (and further defined in Art. XII, Sect. 4), which is earmarked essentially as a separate subtrust for the betterment of the conditions of native Hawaiians. *See* Art. XII, Sect. 6; HRS 10-13.5.

The members of the OHA board also serve as trustees for separate trust funds for the betterment of Hawaiians (including but not limited to native Hawaiians).[6] OHA

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[6] Art. XII, § 5 (OHA "shall hold title to all the real or personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians"); Art. XII, § 6 (OHA trustees "exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and

receives trust funds for Hawaiians from legislative appropriation rather than from the twenty percent of the revenue of the public land trust allocated for native Hawaiians. *See, e.g.*, 1997 Hawaii Session Laws, Act 240. The same OHA trustees administer both the trust for native Hawaiians and the trust for Hawaiians, and are elected by the combined beneficiaries of both trusts.

REASONS FOR DENYING THE WRIT

Certiorari is inappropriate because there is no conflict between the decision of the Ninth Circuit and any decisions of any other circuits (indeed, no other Circuit is likely to consider a question uniquely arising out of Hawaiian history), or any conflict with any decision of the Hawaii Supreme Court (petitioner does not suggest otherwise). Supreme Court Rule (S. Ct. R.) 10(a). Nor does the Ninth Circuit's decision directly conflict with any decision of this Court, S. Ct. R. 10(c), as this Court has not considered the application of *Morton* in the context of Hawaiians and native Hawaiians, let alone in a case where the underlying trust obligation to benefit those groups is unchallenged and thus presumed constitutional. And, as demonstrated below, there is not even an indirect conflict with this Court's decisions or their underlying rationales.

Finally, for two critical reasons, there is no important question of federal law presented in this case. S. Ct. R. 10(c). First, the only issue before this Court is the very narrow one regarding limiting voters to Hawaiians and

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Hawaiians"); HRS § 10-3(1) & (2) ("The purposes of [OHA] include (1) the betterment of conditions of native Hawaiians and (2) the betterment of conditions of Hawaiians. . . . "); Pet. at 51a.

native Hawaiians *when the underlying trust obligation to Hawaiians and native Hawaiians must be accepted as proper.*

Second, the question is so unique to Hawaii that the answer to the question will not impact any of the other 49 states of the Union. This is true not only because of the unique Hawaiian history underlying the federal and Hawaii state statutory and constitutional scheme, but also because none of the other states have any laws even remotely resembling the challenged Hawaii provisions. *Cf. New York v. O'Neill*, 359 U.S. 1, 3 (1959) (granting certiorari because the lower court holding brought "into question the constitutionality of a statute now in force in forty-two States. . . . "); *New York v. Ferber*, 458 U.S. 747, 749 & n.2 (1982) (noting that 47 states had similar statutes). In short, this case will have no effect outside the State of Hawaii.

Finally, for all the reasons given below, the Ninth Circuit correctly decided the narrow issue that was presented, first, on the basis of the unchallenged constitutionality of the underlying trust obligation, and second, because, in light of the similar historically rooted trust obligations undertaken by the United States government to both Indians and native Hawaiians, *Morton* and its progeny, not *Adarand* or *Croson*, are the appropriate guiding precedent.

For any one of these reasons, certiorari is inappropriate.

A. The Challenged Voter Qualification is Based on Legal or Political Status and Not Race; the Similarity of the History Behind the Trust Obligations to Hawaiians and Native Hawaiians and that to the Indians Brings this Case under the *Morton v. Mancari* Doctrine.

Petitioner does not challenge the constitutionality of the underlying trust obligation to Hawaiians and native

Hawaiians, or the similarly restricted administrative structure of OHA.[7]

When the entire longstanding trust structure is accepted in place – as petitioner does accept it – the limitation of the right to vote for OHA trustees to Hawaiians and native Hawaiians is not a racial classification at all. Rather, that line has been drawn between persons who are beneficiaries of the trusts and persons who are not.

Petitioner argues that under the Ninth Circuit's reasoning, if the governing body is charged with targeting benefits and services to a particular racial group, there is no limit to the number or types of racial voting restrictions a State can employ. Pet. at 15. First, if it is assumed that the "racial" group may constitutionally be the special

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[7] Specifically, petitioner does not challenge the designation of specific public lands as homelands for native Hawaiians in the HHCA, or as adopted by the State of Hawaii in its constitution pursuant to the compact of section 4 of the Admission Act. Petitioner does not challenge either the existence of the public land trust established by section 5(f) of the Admission Act or the purpose of the trust of the betterment of the conditions of native Hawaiians, or Article XII Section 4 of the Hawaii Constitution characterizing the public land trust "as a public trust for native Hawaiians and the general public."

Petitioner does not challenge the provisions of Article XII section 5 establishing OHA and conferring on it title to all the real and personal property held in trust for native Hawaiians and Hawaiians, and requiring that board members be Hawaiians, or the automatic allocation under HRS § 10-13.5 of twenty percent of the revenue of the section 5(f) public land trust for native Hawaiians. Petitioner does not challenge the purposes of OHA of the betterment of the conditions of native Hawaiians, and the betterment of the conditions of Hawaiians in HRS § 10-3, or the appropriation of general funds to OHA for the betterment of Hawaiians.

object of attention, as we must in this case, then limiting the voters to those who are within the beneficiary group is not shocking at all; indeed, it is common sense good policy. *Cf. Morton*, 417 U.S. at 554 (recognizing that the preference for Indians "further[s] the cause of Indian self-government," makes the governing body "more responsive to the needs of its constituent groups," and "is directed to participation by the governed in the governing agency."). Second, not any racial voting restriction was condoned by the Ninth Circuit, but, consistent with *Morton*, only one that fulfills historically rooted trust obligations to people of a formerly independent sovereign nation.

Morton, after all, applied the rational basis test because of "the unique legal status of Indian tribes under the federal law," and "the assumption of a 'guardian-ward' status," 417 U.S. at 551, which flowed from the "special relationship" between the United States and the Indians. 417 U.S. at 535-36. The root of this special relationship was described as follows:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others. . . . Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic."

417 U.S. at 552. This Court concluded "[a]s long as the special treatment can be tied *rationally* to the fulfillment of Congress' unique obligation toward the Indians, such

legislative judgments will not be disturbed." 417 U.S. at 555.

The courts below properly applied the *Morton* rational basis standard to this case. The obligations of the federal government toward native Hawaiians parallel the obligations of the federal government toward Indian tribes and arise from the same shared history of dispossession and loss of sovereignty of indigenous peoples. The existence of the trust relationship with native Hawaiians is indisputable on the face of the Admission Act and under existing case law. *E.g., Keaukaha-Panaewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1471 (9th Cir. 1984) ("The Admission Act clearly mandates establishment of a trust for the betterment of native Hawaiians."); *Price v. Akaka*, 3 F.3d at 1225 ("Congress enacted the Admission Act, a federal public trust. . . . ").

Second, the promulgation by Congress of legislation solely for the benefit of native Hawaiians and Hawaiians[8], and the inclusion of native Hawaiians (and often Hawaiians) in legislation promulgated primarily for the benefit of native American Indians[9], constitute further

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[8] *See, e.g.*, Native Hawaiian Education Act, 20 U.S.C. § 7901 et seq.; the Native Hawaiian Health Care Improvement Act of 1992, 42 U.S.C. § 11701 et seq.; 20 U.S.C. § 4441 (Program for Native Hawaiian and Alaska Native Culture and Arts); 20 U.S.C. § 7118 (allotting money for drug and violence prevention programs); 42 U.S.C. § 254s (Native Hawaiian Health Scholarship); 42 U.S.C. § 3057 et seq. (Native Hawaiian Health Program). These statutes extend benefits to "Hawaiians" as well as "native Hawaiians."

[9] Native Americans Programs Act of 1974 (*See* 42 U.S.C. § 2991 et seq.); American Indian Religious Freedom Act of 1978 (42 U.S.C. § 1996); National Museum of the American Indian Act (20 U.S.C. § 80q et seq.); Native American Graves Protection and

compelling evidence of the continuing guardian-ward relationship between the federal government and native Hawaiians and Hawaiians. These statutes repetitively affirm the special relationship that exists between the United States and the native Hawaiian people, and the trust responsibilities and unique legal relationship of the United States to native Hawaiians.

Petitioner claims that the Ninth Circuit's decision means that states can enact racial preferences by simply prefacing their legislation with the designation of the preferred group as the beneficiary of a "public trust" or "special relationship" with the government. Pet. at 2, 11. This is wrong for two reasons. First, the Ninth Circuit's decision was limited to the unique situation where the underlying trust purpose to benefit native Hawaiians and Hawaiians must be accepted as proper; thus, the voter limitation to the same groups simply reflects the political, and nonracial, desire to limit the voters to the beneficiary class. Second, a legislature cannot simply designate preferred groups. Both *Morton* and the Ninth Circuit's decision in this case were rooted in a unique *history* of an aboriginal people, who were the former subjects of an independent sovereign nation, being taken over by a different sovereign nation, and whose displacement and resulting disadvantage was to be ameliorated by the conquering government's assumption of a trust obligation to

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Repatriation Act (25 U.S.C. § 3001 et seq.); National Historic Preservation Act (16 U.S.C. § 470 et seq.); the Native American Languages Act (25 U.S.C. § 2901 et seq.); the Indian Health Care Amendments of 1988 (25 U.S.C. § 1601 et seq.); 15 U.S.C. § 637 (Aid to Small Business); 20 U.S.C. § 1106b (Teacher Corps preferences); 42 U.S.C. § 3011 (establishing Office for American Indian, Alaska Native, and Native Hawaiian Programs on Aging).

these people. These historically-rooted and unique factors are plainly not ones that a clever state legislature could simply concoct at will.

1. Imposing a Tribal Requirement for *Morton* is Unjustified.

Petitioner wrongly narrows the scope of *Morton* to formally recognized tribes, Pet. at 17-20, by ignoring the critical portion of *Morton* that held that the primary reason the classification in *Morton* was political and not racial was not because of any tribal requirement, but rather, as stated by this Court:

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial" preference. Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency.

Morton, 417 U.S. at 554. Thus, the key reason the classification was not racial was not because of the formal tribal aspect but because the restriction was designed to further self-governance. While this Court did mention, in a footnote, 417 U.S. at 553 n.24, that the preference was given to only tribal Indians, and not all racial Indians, that actually supports the notion that the reason the restriction was political and not racial was because of the *self-governance* aspect. Why? Because the BIA positions for which the preference applied were those that "administ[ered] functions or services affecting any Indian *tribe*." *See* 417 U.S. at 537-38 (emphasis added). Thus, to give the preference to all racial Indians, even if they were not tribal Indians, would have actually undercut the self-

governance aspect that motivated *Morton*. That explains why this Court went on to say that the preference is "granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities *whose lives and activities are governed by the BIA* in a unique fashion." 417 U.S. at 554. In short, the tribal limitation was necessary because the BIA positions for which the preference applied governed *tribal* Indians. In this case, on the contrary, because OHA beneficiaries are *all* Hawaiians and native Hawaiians, without regard to any tribal classification, self-governance is promoted by allowing the voters to be all Hawaiians and native Hawaiians, regardless of any tribal status.

Another way to understand why there should be no artificial tribal requirement for Hawaiians is that for the Indians the formerly independent sovereign entity that governed them was the tribe, but for native Hawaiians, their formerly independent sovereign nation was the Kingdom of Hawaii, not any particular "tribe" or equivalent political entity. Thus, because *Morton* turned upon the desire to promote Indian self-governance, it made sense to give the preference to only those Indians who were members of the formerly sovereign entity (i.e. the tribe), which meant only tribal Indians. Similarly, promoting Hawaiian self-governance is accomplished by giving the preference (here, the exclusive franchise in electing OHA trustees) to all those who were members of (or their descendants) the former sovereign nation. Because that former sovereign is the Kingdom of Hawaii, not any particular tribe or equivalent "political entity," all Hawaiians should qualify. The tribal concept simply has no place in the context of Hawaiian history.

And petitioner is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty

Clauses of the Constitution. Pet. at 19. Any careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the self-governance factors, which apply equally well to Hawaiian history and the voter restriction. The Indian clauses simply *reflect* and *arise out of* the historical relationship; namely, the conquering of an aboriginal people who were the subjects of a formerly independent nation. The analogous historical relationship in the case of Hawaiians and native Hawaiians is reflected by the Annexation Act of 1898, the Organic Act of 1900, the Hawaiian Homes Commission Act of 1920, and the Admission Act of 1959. These Acts for Hawaiians and native Hawaiians are the equivalents of the Indian Commerce and Treaty Clauses for Indians discussed in *Morton*.

2. The *Washington* Case Does Not Support Petitioner.

Petitioner's argument, relying upon *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463 (1979), that special treatment cannot be conferred by the *states*, as opposed to the federal government, *see* Pet. at 20-21, is specious. *Washington* specifically upheld a *state*-conferred special treatment of Indians (imposing a "checkerboard" pattern of state jurisdiction over nonconsenting tribes) because it was "enacted in response to a *federal* measure explicitly designed to readjust the allocation of jurisdiction over Indians." 439 U.S. at 501. Analogously, the entire OHA scheme (including the voter restriction) – designed to carry out trust obligations to native Hawaiians and Hawaiians – was enacted in direct response to *federal* statutes explicitly requiring the State of Hawaii to carry out or fulfill federal trust obligations to native Hawaiians. *See* Admission Act (requiring

Hawaii to manage 5(f) trust land for the "betterment of the conditions of native Hawaiians," among other purposes); *see also* Hawaiian Homes Commission Act (requiring Hawaii to distribute leases of land to native Hawaiians).

Petitioner's claim that the voter restriction was not *specifically* authorized by any federal law, Pet. at 21, ignores the plain fact, recognized for Indians in *Morton*, that by helping to ensure Hawaiian self-governance, the restriction does fulfill the specific federal authorization to better the conditions of native Hawaiians.

Petitioner's attempt to defeat this logic by noting that Hawaiians of less than 50% native blood are not the express beneficiaries of the Admission Act's command, Pet. at 21, rests upon a strained and cramped view of what betters the conditions of native Hawaiians. Hawaiians, after all, being necessarily the descendants of native Hawaiians, are the closest culturally to native Hawaiians and thus are the best proxies for native Hawaiians. Indeed, in time, there will be very few native Hawaiians left to receive the benefits of the trust obligation.[10] Because Hawaiians of less than 50% native blood are the people most culturally similar, and the closest relatives, to native Hawaiians, it is entirely reasonable for Hawaii to include all Hawaiians within the voting qualification, and to view that inclusion as serving the Admission Act's command to better the conditions of native Hawaiians.

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[10] In 1984, there were only 8244 one hundred percent Hawaiians. Of these, 5433 were 45 years old or older. OHA, Native Hawaiian Databook 1996, Table 1.16 at 34.

B. The Affirmative Action Cases of *Adarand* and *Croson* Are Not Controlling.

Petitioner's claim that *Adarand* and *Croson* make clear that classifications based solely on race are subject to strict scrutiny regardless of the particular race involved, Pet. at 22-23, is false. The mere fact that Native Americans or Indians were included in the prohibited preferences in those cases does *not* support petitioner's theory. For that specific group was only one out of many other racial groups that received equal benefit of the racial preference. Thus, because the affirmative action programs included groups other than Native Americans or Indians, it could not have been argued that the overall program fulfilled historical trust obligations, when most of the minorities benefited were not the beneficiaries of such obligations.

Moreover, not only do *Adarand* and *Croson* not involve historically rooted trust obligations, subject to the *Morton* line of cases, but they were not cases where it was *presumed* that the benefited groups could properly be singled out to receive the benefit. Instead, the Court in *Adarand* required that the case be sent back to determine whether the minorities could properly receive such a benefit. *Adarand*, 515 U.S. at 237-239. Here, on the contrary, it is presumed that the trust obligation to Hawaiians and native Hawaiians is permissible – because petitioner never challenged it – and thus, it must be assumed Hawaiians and native Hawaiians can properly receive a benefit. If anything, therefore, *Adarand* and *Croson* actually *support* the Ninth Circuit's conclusion in this case.

Petitioner's argument that the Ninth Circuit violated *Croson* by failing to consider "race-neutral" means of achieving the same goals is baseless. Pet. at 26-27. The

Ninth Circuit properly understood that fulfilling the goal of insuring proper management of the trust obligation to *Hawaiians* and *native Hawaiians* could not be done by race-neutral means. Indeed, this Court in *Morton* recognized this very fact by endorsing the Indian preference as necessary to Indian self-governance and to ensure that the BIA was "more responsive to the needs of its constituent groups." 417 U.S. at 554. In any event, *Croson* is wholly inapplicable to this case, which falls into the *Morton* line of cases, not the affirmative action jurisprudence.

C. Hawaii's Voting Restriction Rationally Serves the Interest of Bettering the Conditions of Native Hawaiians; in Fact, as the Ninth Circuit held, it Fulfills Hawaii's Compelling Interest in Honoring the Trust Obligation Imposed by Congress, and it Prevents the Extinction of an Entire Native Culture.

The voter restriction, by promoting Hawaiian self-governance, was rationally related to the state interest in complying with the Admission Act's command to better the conditions of native Hawaiians. As the district court succinctly stated:

> The State of Hawaii did not create the trust relationship with Native Hawaiians, nor did it enact the initial legislation singling Native Hawaiians out for special treatment. Rather, the State of Hawaii merely enacted a reasonable method to satisfy its obligation to utilize a portion of the proceeds from the § 5(b) lands for the betterment of Native Hawaiians.

963 F. Supp. at 1555; Pet. at 37a. Again, it must be stressed that because the Admission Act's command that Hawaii

better the conditions of native Hawaiians was not challenged in this case, that command must be presumed constitutional.

The report of the 1978 constitutional convention confirms the rationality of the voting restriction:

> [A] board of trustees chosen from among those who are interested parties would be the best way to ensure proper management and adherence to the needed fiduciary principles. . . . [T]he board should be elected by all the beneficiaries. Certainly they would best protect their own rights. Such a practice is in line with the basic principles of a democratic society.

Proceedings at 644-45. Petitioner fails to provide any reason why the non-beneficiaries of the trusts should participate equally with the beneficiaries in selecting the trustees.

Moreover, the Ninth Circuit correctly held that the voting restriction would even survive strict scrutiny because it serves "the state's compelling responsibility to honor the trust," and "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.' " Pet. at 17a. In addition, Hawaii has a compelling interest in bettering the condition of native Hawaiians not only for the well-being of individual native Hawaiians, but because doing so will preserve what is left of the culture, tradition, and language of the pre-1778 inhabitants. The HHCA, the Admission Act, Article XII of the Hawaii Constitution, and HRS Chapters 10 and 13D all reflect the determination that the original Hawaiian heritage should be preserved from extinction.

In dismissing the Ninth Circuit's finding of a compelling state interest, petitioner claims that the State is not

compelled to administer its public trust lands "in a manner that differentiates away Hawaii[ ] citizens on the basis of race." Pet. at 24. This is absurd; the only way that Hawaii can fulfill its trust obligations to Hawaiians and native Hawaiians is by differentiating between citizens who are the beneficiaries versus those who are not. And although the beneficiaries may seem at first to be defined in racial terms, the real criteria is political; namely, those people (and their descendants) who were subjects of a formerly independent sovereign nation, and to whom the trust obligations run.

The mere fact that the 5(f) trust obligation does not run *exclusively* to the "betterment of the conditions of native Hawaiians," given the other four purposes, Pet. at 24-25, hardly suggests that the portion of the trust obligation to native Hawaiians can be ignored. Hawaii surely has a compelling interest in fulfilling that portion of its 5(f) trust obligation that does run in favor of native Hawaiians. Whether or not the state was fulfilling its 5(f) obligation to native Hawaiians from 1959 through 1978, Pet. at 25, is not the issue in this case. The only question is whether the state, from 1978 forward, has a compelling interest in honoring its 5(f) trust obligation to native Hawaiians.

Petitioner's suggestion that the Ninth Circuit's recognition that having the OHA board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles" is invalid and patently offensive, Pet. at 25, completely ignores the fundamental rule of *Morton*. *Morton*, after all, supports the Ninth Circuit's view by stating that the Indian preference was a "criterion reasonably designed to further the cause of Indian

self-government and to make the BIA more responsive to the needs of its constituent groups." 417 U.S. at 554.

Finally, petitioner wrongly argues that the voting restriction is not narrowly tailored because the majority of OHA voters are not native Hawaiians, but Hawaiians (of less than 50%). Pet. at 27. First, even petitioner concedes OHA administers a significant amount of money on behalf of Hawaiians who are not native Hawaiians. The trusts for native Hawaiians and Hawaiians administered by OHA are *separate* trusts separately funded. The same trustees administer both trusts and are elected by the combined beneficiaries of both trusts. Thus, allowing Hawaiians (of less than 50%) to vote *is* narrowly tailored. To exclude such Hawaiians would likely raise a claim by petitioner that the limitation was not narrowly tailored to serving OHA's separate obligation to Hawaiians.

In any event, as discussed earlier, "Hawaiians" do approximate "native Hawaiians" in that the former are necessarily descendants of the latter, and are thus most likely to be culturally and politically similar. Besides, petitioner should not be allowed to attack a voting requirement as improperly excluding people by arguing that it should have excluded even more people.

D. The Ninth Circuit Properly Ruled that Because Petitioner Did Not Challenge the Validity of the Underlying Trust Obligation to Native Hawaiians, the Courts Must Assume the Validity of That Trust Obligation when Deciding the Constitutionality of the Voting Restriction.

Because petitioner never challenged the underlying trust obligation to native Hawaiians, the Ninth Circuit

had no choice but to assume the validity of that obligation, if for no other reason than the fact that the record, developed solely to attack the *voting restriction*, could not sustain an attack on the underlying trust obligation. Petitioner to this day does not, and cannot, attack the constitutionality of that trust obligation. Therefore, the question petitioner wishes this Court to consider – the constitutionality of the voting restriction when the underlying trust obligation is also under attack – is simply not before this Court. For this reason alone, certiorari should be denied.

Petitioner argues that even assuming the validity of the underlying trust obligation to Hawaiians and native Hawaiians, it is improper for the state to "further" the "race discrimination" by limiting the right to vote. Pet. at 26, 29. He bases this claim on the wholly non-analogous situation of *private* discrimination that cannot be furthered by *state-action* agency enforcement. In *Pennsylvania v. Bd. of Dirs. of City Trusts*, 353 U.S. 230 (1957), for example, the private discrimination is not unconstitutional until it is enforced by a state entity, given the state action requirement. In our case, on the contrary, the underlying trust obligation to Hawaiians and native Hawaiians, which is presumed constitutional, from the start involves state action. Thus, the "furthering" of the trust obligation by limiting the voters to Hawaiians and native Hawaiians does not *add* a state action component and thus cannot create an unconstitutionality. The *Pennsylvania* case, therefore, is wholly distinguishable.

E. Because the OHA Election Falls Within the *Salyer* Special Purpose/Disproportionate Impact Election Doctrine, the Voting Restriction Does Not Violate Either the Fourteenth or Fifteenth Amendment.

In addition to the reasons set forth above, petitioner's claims fail because, as the courts below recognized, OHA serves a special limited purpose that disproportionately affects its electors, and is therefore excepted from the principle of one-person, one-vote. *See Salyer Land Co.*, 410 U.S. at 728 (1973) and *Ball v. James*, 451 U.S. 355, 370-71 (1981). The constitutional leeway for such elections is an aspect of *federalism* reflecting "the necessity of permitting experimentation with political structures to meet the often novel problems confronting local communities." *Ball*, 451 U.S. at 373 (Powell, J., concurring).

The test for special limited purpose turns on whether the entity exercises "general governmental powers" or whether its powers are "so far removed from normal governmental activities." *Ball*, 451 U.S. at 363. OHA lacks critical general governmental powers: it cannot enact laws, and has no regulatory or police power; and it has no power to impose taxes or to levy other assessments. In fact, OHA has virtually no control over its income. The money for *native* Hawaiians from the subtrust of the section 5(f) public land trust has been fixed by the legislature at twenty percent. HRS § 10-13.5. Pet. at 54a. The money for the trust for *Hawaiians* is set by legislative appropriation. Petitioner, through his elected state representatives, has the same degree of influence in these decisions as native Hawaiians or Hawaiians. In *Ball*, 451 U.S. at 371 n.20, this Court noted that the non-voters "remain equal participants in the election of the state

legislators who created and have the power to change the District."

OHA acts as a disbursement agent or conduit for the monies it receives but, because the core function of OHA is to manage and administer the trusts for native Hawaiians and Hawaiians, OHA's disbursement activities are subject to the stringent legal controls of trust law.

OHA's powers are far less general, and far more removed from normal government activities than the entities in *Salyer* or *Ball*. Unlike OHA, the water district in *Salyer* had an assessment power as well as broad power to issue general obligation bonds. OHA, like the water district, does not provide "general public services such as schools, housing, transportation, utilities, roads, or anything else of the type ordinarily financed by a municipal body." 410 U.S. at 728-29. OHA has no involvement in the funding or operation of the State of Hawaii's general public services.

Finally, petitioner cannot plausibly argue that the activities of OHA do not disproportionately affect the beneficiaries of the trusts it administers. Petitioner complains that the Ninth Circuit improperly extended *Salyer* to a state agency that expends general tax revenues. Pet. at 16. First, OHA does *not* expend general tax revenues for exclusively *native* Hawaiians, but instead uses the land (and its proceeds) from the public land trust that was created by the Admission Act. Second, even if general tax revenues are used to benefit *Hawaiians*, the only relevant issue under *Salyer* is whether OHA's actions disproportionately affect Hawaiians. 410 U.S. at 727-28; *Ball*, 451 U.S. at 371. The mere fact that general revenues are used does not change the fact that Hawaiians are obviously disproportionately affected by how OHA

spends that money.[11] That the funds may come from general tax revenues is especially irrelevant when we must presume the constitutionality of using general tax revenues to benefit only Hawaiians, since petitioner never challenged that allocation.[12] *See supra*, footnote 7.

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[11] In short, although the source of the revenue (from all Hawaii taxpayers) does not demonstrate disproportionate impact, it is beyond dispute that the *expenditure* of the revenue to better the condition of Hawaiians disproportionately impacts Hawaiians. *See Ball*, 451 U.S. at 371 (distribution of *benefits*, as well as burdens, is relevant to disproportionate impact analysis).

[12] Petitioner's Fifteenth Amendment claim fails for the additional reason that he did not show the required discriminatory intent. *Mobile v. Boulden*, 446 U.S. 55, 62 (1980). Unlike claims under the Voting Rights Act of 1965, which petitioner abandoned, the Fifteenth Amendment does require proof of discriminatory intent. *Chisom v. Roemer*, 501 U.S. 380, 392-95 (1991). There simply was no illicit racially discriminatory purpose on the part of the State of Hawaii. Rather, Hawaii's establishment of OHA, allocating 20 percent of the public land trust revenues for native Hawaiians, and designating the beneficiaries to select the OHA trustees, simply reflect the nondiscriminatory purpose of complying with and implementing the Admission Act's command to better the conditions of native Hawaiians.

The legislative history makes clear that the purpose of the voter restriction was to ensure that "people to whom assets belong should have control over them" and that "a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." *Proceedings* at 644. The limitation of the right to vote for OHA trustees to native Hawaiians and Hawaiians merely reflects the *legal status* of native Hawaiians and Hawaiians as the only beneficiaries of the trusts administered by OHA, the only persons to whom the OHA trustees owe a duty of loyalty, and the only persons to whom the OHA trustees are accountable for breaches of

CONCLUSION

For the foregoing reasons, the petition for certiorari should be denied.

DATED: Honolulu, Hawaii, December 29, 1998.

Respectfully submitted,

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fiduciary duty. In sum, limiting the vote to native Hawaiians and Hawaiians is based not on race, but on the legal status of native Hawaiians and Hawaiians as the sole beneficiaries of the trusts administered by the elected OHA trustees.

APPENDIX

THE ADMISSION ACT

An Act to Provide for the Admission of the State of Hawaii into the Union

(Act of March 18, 1959, Pub L 86-3, 73 Stat 4)

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That, subject to the provisions of this Act, and upon issuance of the proclamation required by section 7(c) of this Act, the State of Hawaii is hereby declared to be a State of the United States of America, is declared admitted into the Union on an equal footing with the other States in all respects whatever. . . .

* * *

§ 4. As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, shall be adopted as a provisions of the Constitution of said State, as provided in section 7, subsection (b) of this Act, subject to amendment or repeal only with the consent of the United States, and in no other manner: Provided, That (1) sections 202, 213, 219, 220, 222, 224, and 225 and other provisions relating to administration, and paragraph (2) of section 204, sections 206 and 212, and other provisions relating to the powers and duties of officers other than those charged with the administration of said Act, may be amended in the constitution, or in the manner required for State legislation, but the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund shall not be reduced or impaired by any such amendment, whether

made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, shall not be increased, except with the consent of the United States; (2) that any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation, but the qualifications of lessees shall not be changed except with the consent of the United States; and (3) that all proceeds and income from the "available lands", as defined by said Act, shall be used only in carrying out the provisions of said Act.

HAWAIIAN HOMES COMMISSION ACT, 1920

* * *

TITLE 2: HAWAIIAN HOMES COMMISSION

§ 201. [Definitions.] (a) That when used in this title:

(1) The term "commission" means the Hawaiian Homes Commission;

(2) The term "public land" has the same meaning as defined in paragraph (3) of subdivision (a) of section 73 of the Hawaiian Organic Act;

(3) The term "fund" means the Hawaiian home loan fund;

(4) The term "State" means the State of Hawaii;

(5) The term "Hawaiian home lands" means all lands given the status of Hawaiian home lands under the provisions of section 204 of this title;

(6) The term "tract" means any tract of Hawaiian home lands leased, as authorized by section 207 of this title, or any portion of such tract;

(7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778;. . . .

* * *

§ 202. Department officers, staff, commission, members, compensation. (a) There shall be a department of Hawaiian home lands which shall be headed by an executive board to be known as the Hawaiian homes commission. . . .

* * *

§ 203. Certain public lands designated "available lands." All public lands of the description and acreage, as follows, excluding (a) all lands within any forest reservation, (b) all cultivated sugar-cane lands, and (c) all public lands held under a certificate of occupation, homestead lease, right of purchase lease, or special homestead agreement, are hereby designated, and hereinafter referred to, as "available lands":

(1) On the island of Hawaii: Kamaoa-Puueo (eleven thousand acres . . . .) [etc.] . . . .

* * *

§ 204. Control by department of "available lands," return to board of land and natural resources, when; other lands, use of. (a) Upon the passage of this Act, all available lands shall immediately assume the status of Hawaiian home lands and be under the control of the

department to be used and disposed of in accordance with the provisions of this Act, except that:. . . .

* * *

§ 207. Leases to Hawaiians, licenses. (a) The department is authorized to lease to native Hawaiians the right to the use and occupancy of a tract or tracts of Hawaiian home lands within the following acreage limits per each lessee: (1) not more than forty acres of agriculture lands or lands used for aquaculture purposes; or (2) not more than one hundred acres of irrigated pastoral lands and not more than one thousand acres of other pastoral lands; or (3) not more than one acre of any class of land to be used as a residence lot; provided that. . . .

* * *

§ 208. Conditions of leases. Each lease made under the authority granted the department by section 207 of this Act, and the tract in respect to which the lease is made, shall be deemed subject to the following conditions, whether or not stipulated in the lease:

(1) The original lessee shall be a native Hawaiian, not less than eighteen years of age. In case two lessees either original or in succession marry, they shall choose the lease to be retained, and the remaining lease shall be transferred, quitclaimed, or canceled in accordance with the provisions of succeeding sections.

(2) The lessee shall pay a rental of $1 a year for the tract and the lease shall be for a term of ninety-nine years; except that . . . .

Supreme Court, U.S.
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No. 98-818

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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Respondent's brief in opposition provides ample additional evidence -- if any were needed -- of the pernicious effect of the decision below and of the compelling need for plenary review by this Court. In attempting to defend the judgment below, respondent unabashedly relies on the repugnant propositions that States can appropriately use one racial subgroup of citizens as a "proxy" for another, so long as they share a sufficiently similar racial makeup (Opp. 20, 25), and that race-based state action is justified to protect pure "Hawaiian" blood from dilution (Opp. 6, 20 & n.10) -- an amazing claim given that such a call for racial purity has been a constitutionally illegitimate goal since, at the latest, *Loving v. Virginia*, 388 U.S. 1 (1967). Equally illegitimate is respondent's defense of the Ninth Circuit's holding that the existence of one racial classification serves to justify further racial gerrymandering. According to respondent and the court below, such race-based restrictions on the right to vote are not only constitutional, but "common sense good policy." Opp. 14.

That the Ninth Circuit's decision legitimates and provides strong support for such patently offensive notions is the strongest possible evidence that review is warranted in this case. In addition, respondent has offered no persuasive response to petitioner's showing that certiorari is necessary to restore the fundamental guarantees of the Fourteenth and Fifteenth Amendments and to resolve the numerous conflicts between the decision below and this Court's precedents.

I. Respondent's Attempts To Reconcile The Ninth Circuit's Opinion With This Court's Settled Equal Protection Jurisprudence Only Demonstrate The Seriousness Of The Conflict Created By The Decision Below

Respondent's attempts to harmonize the decision below with this Court's equal protection jurisprudence are meritless and rest upon glaringly incorrect assump-

tions. Respondent asserts that facially racial laws are subject to strict scrutiny only upon proof of discriminatory legislative intent. Opp. 29 n.12. To the contrary, however, this Court has repeatedly held that "[n]o inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw v. Reno*, 509 U.S. 630, 642 (1993); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966).

Similarly, respondent contends that the decision below is defensible both because the strict scrutiny of race-based laws mandated by *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), applies only to "'affirmative action' type of race based distinctions." Opp. 1, 22. This contention is irreconcilable with this Court's precedent, which makes clear that "the Fourteenth Amendment requires strict scrutiny of all race-based action by state and local governments," and that "'the standard of review under the Equal Protection Clause is not dependent on the race of those burdened or benefited by a particular classification.'" *Adarand*, 515 U.S. at 222, 224 (quoting *Croson*, 488 U.S. at 494); *Shaw*, 509 U.S. at 642-43.

Respondent fails to identify any compelling state interest to support the Office of Hawaiian Affairs ("OHA") racial classification. Respondent offers three purported justifications for race-exclusive voting: (1) "proper management" of trust funds; (2) "bettering the conditions" of the preferred race; and (3) preserving the "culture, tradition, and language of the pre-1778 inhabitants." Opp. 23. The Ninth Circuit endorsed only the first. Pet. App. 17a. None of these interests, however, has ever been recognized as compelling by this Court, and for good reason, because doing so would allow States to discriminate almost at will.

Respondent also wrongly asserts (Opp. 21-22) that States need not consider race-neutral alternatives before enacting race-based laws, and that courts need only

rubber stamp a State's decision to rely on racial categories. This Court, however, requires the governmental entity that *enacts* a race-based law to "carefully examine[] and reject[] race-neutral alternatives" (*Croson*, 488 U.S. at 507), and a reviewing court to conduct a "most searching examination" of the government's decision. *Adarand*, 515 U.S. at 223. The Ninth Circuit could not cure the constitutional defect here by arrogating to itself the legislative function of exploring race-neutral alternatives: "There is no evidence in this record that [the State of Hawaii] had considered any alternatives to a race-based" regime. *Croson*, 488 U.S. at 507. In any event, the court below did not even cursorily examine race-neutral alternatives, despite its acknowledgment that Hawaii had administered the trust lands without regard to race from 1959 to 1978.[1]

Nor has respondent shown that the OHA election laws are narrowly tailored to address any of his proffered state interests. First, "proper management" of a trust does not require racial purity in the OHA electorate. Indeed, the fact that the decision below rests on such an offensive and stereotypical notion conclusively demonstrates the need for this Court's review.[2] Second, if ensuring the "well-being of individual native Hawai-

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1 The court also failed to consider the simple fact that under the Hawaii Admission Act, Pub. L. No. 89-3, § 5(f), 73 Stat. 437 (1959), Hawaii is not required to give any sort of preference to a racial group. Pet. App. 48a ("Such lands, proceeds, and income shall be managed and disposed of for *one or more* of the foregoing purposes . . . .").

2 The outrageousness of this claim is plain from the sort of law it would legitimate. Under respondent's theory, States could ban whites from administering trusts for African-Americans, and vice versa, if limiting trustees to members of only one race is necessary for "proper management" of trusts benefiting members of that race.

ians" is a compelling state interest for equal protection analysis, then strict scrutiny will be reduced to a rubber stamp for racial preferences, because the same could plainly be said of any racial group. Third, even if preservation of the "culture, tradition, and language of the pre-1778 inhabitants" were a compelling state interest, the Constitution would not countenance a link between such an interest and race-based election laws. This Court has already rejected such "political apartheid." *Shaw*, 509 U.S. at 647. Lumping individuals with common ancestors together on the assumption that they "think alike, share the same political interests, and will prefer the same candidates at the polls" is constitutionally impermissible. *Id.*

II. As Respondent's Brief Confirms, The Opinion Below Directly Contradicts This Court's Holding In *Mancari* And Is Inconsistent With Congress's Powers Under The Indian Commerce And Treaty Clauses

Respondent's contention that the racial classification at issue here is justified by this Court's recognition in *Morton v. Mancari*, 417 U.S. 535 (1974), of a "special relationship" between the United States and formally recognized Indian Tribes is fundamentally flawed. Moreover, respondent makes two notable concessions in his discussion of *Mancari*: (1) nothing in the Constitution, and in particular neither the Indian Commerce Clause nor the Treaty Clause, authorizes the racial classification at issue (Opp. 18-19), and (2) "native Hawaiians" and "Hawaiians" cannot qualify as an Indian tribe -- as respondent put it, "[t]he tribal concept simply has no place in the context of Hawaiian history." Opp. 18.

Respondent's entire *Mancari* argument can be summed up in his contention that it "is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty Clauses of the Constitution. Any careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the

self-governance factors, which apply equally well to Hawaiian history and the voter restriction." Opp. 18-19 (citation omitted). Respondent's reading of *Mancari* is flatly contradicted by the constitutional text and by this Court's opinions in *Mancari* and its progeny, and would wreak havoc on established jurisprudence under the Fourteenth and Fifteenth Amendments.

The Court made clear in *Mancari* and its progeny that the special relationship is limited to members of federally recognized Indian *tribes*, and that classifications based on Indians as a purely racial category would be subject to the same exacting scrutiny as any other racial classification. *See* Pet. 17-20. Since, by respondent's own concession, the racial classifications of "native Hawaiian" and "Hawaiian" cannot satisfy the tribal requirement, they cannot be justified by *Mancari*.[3]

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[3] The court of appeals' opinion also directly conflicts with the holding of *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979), that the "special relationship" does not apply to the States. Respondent's attempts to reconcile this case with *Yakima Nation* are singularly unavailing. Unlike the federal laws in *Yakima Nation*, which were "explicitly designed" to grant the State the authority to undertake the precise regulation of Indians challenged and thus fell within Congress's "plenary power over Indian affairs" (*id.*), nothing in the Hawaii Admission Act or any other federal statute sets aside any portion of the ceded lands trust exclusively for "native Hawaiians" (*see* Hawaii Admission Act § 5(f)) -- let alone for members of any Indian tribe -- and Congress has never attempted to authorize racially segregated voting in OHA elections. Indeed, the Fifth and Fifteenth Amendments would forbid any such attempt. If respondent's reading of *Mancari* were correct, then *Mancari* would be in conflict with *Adarand* and *Croson* and would have to be overruled.

Moreover, any trust relationship created by federal law would be limited to "native Hawaiians," *i.e.*, descendants of pre-1778

In his discussion of *Mancari* and throughout his brief, respondent relies heavily on his unfounded, but oft-repeated, claim that the racial voting restriction for OHA elections merely seeks to promote the goal of self-governance by granting an exclusive franchise in electing OHA trustees to "those people (and their descendants) who were subjects of a formerly independent sovereign nation." Opp. 24. Respondent's "self-governance" mantra, however, is an historically untenable attempt to mask the scheme's blatant racial content.

If, as respondent claims, the OHA election scheme aims to promote self-governance for descendants of all who were subjects of the formerly independent Kingdom of Hawaii, then the relevant date for defining the beneficiaries should be 1893 (the year the Kingdom was overthrown), and not 1778 (the year the first Anglo-Saxon purportedly visited the Hawaiian Islands). Indeed, the choice of year makes clear that race, as opposed to "sovereignty," is the sole factor. The glaring historical fact respondent omits from his brief is that at the time of the overthrow of the Kingdom of Hawaii in 1893, the inhabitants of the Hawaiian Islands descended from pre-1778 inhabitants "constituted less than half of the population. A majority of the inhabitants were non-Native Hawaiians; many of them were born in Hawaii, and many were citizens of Hawaii." Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 550 (1996); *accord* Hawaiian Almanac and Annual for 1897 at 11, 13 (listing the total population of the Hawaiian Islands in 1890 was 89,990, with full- and partial-blooded Hawaiians accounting for only 40,622).

races that satisfy the 50 percent blood quantum requirement, and could not possibly support the much broader racial classification of "Hawaiians," which is a creation of state law. *See* Haw. Const. art. XII, § 5; Haw. Rev. Stat. § 10-2. Respondent's contention that the State can permissibly use the more racially mixed category of "Hawaiians" as a proxy for the betterment of "native Hawaiians" resurrects the patently offensive notion that it is legitimate for States to categorize voters based on racial stereotypes. *Cf. Shaw*, 509 U.S. at 647.

Thus, to the extent the OHA voting scheme promotes "self-governance," it does so only for a subset of "those people (and their descendants) who were subjects of a formerly independent sovereign nation," *a subset defined exclusively along racial lines*. Indeed, *petitioner himself* is a descendant of subjects of the pre-revolution Kingdom of Hawaii (Pet. App. 6a); the fact that he was nonetheless excluded from voting belies respondent's attempt to clothe Hawaii's racial gerrymander in race-neutral garb. The Ninth Circuit found that Hawaii's laws conditioning the right to vote on the content of one's blood "contain a racial classification on their face." Pet. App. 11a. Respondent does not challenge that finding in his brief, nor could he.

III. As Respondent Appears To Concede, There Is No Support For The Court Of Appeals' Remarkable Holding That *Salyer* Exempts Broad Categories Of Statewide Elections From The Fifteenth Amendment's Prohibition On Race-Based Election Laws

Strikingly, respondent makes no attempt whatsoever to support the Ninth Circuit's erroneous holding that the exception to the *Fourteenth* Amendment's one-person-one-vote rule recognized in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), for "special purpose" elections, carves out an exception to the *Fifteenth* Amendment's prohibition of race-based election laws. Thus, respondent appears to concede (Opp. 27-29) that the Ninth Circuit's dramatic narrowing of the Fifteenth Amendment's scope is irreconcilable with this Court's well-settled case law (Pet. 12-16) and is squarely contrary to the unambiguous text of the

Amendment. Given that this unprecedented expansion of the *Salyer* doctrine would shield from close scrutiny any racial restriction on access to the ballot box, so long as those who are permitted to vote are the special objects of attention of the limited-purpose government body for whom they are voting, it is no wonder respondent elected not to defend this portion of the Ninth Circuit's opinion.[4]

Also striking is respondent's concession (Opp. 28-29) that a substantial portion of OHA's funds comes from general tax revenues, in violation of the "substantial effects" prong of *Salyer*. Nevertheless, respondent argues, "although the source of the revenue (from all Hawaii taxpayers) does not demonstrate disproportionate impact, it is beyond dispute that the *expenditure* of the revenue to better the condition of Hawaiians disproportionately impacts Hawaiians." Opp. 29 n.11. Once again, the breadth of the rationale proffered by respondent and the Ninth Circuit is staggering. Any state agency charged with doling out general tax dollars exclusively to a preferred race of citizens would fit respondent's criteria and would therefore qualify for the purported *Salyer* exception to the Fifteenth Amendment. In addition to gutting the Fifteenth Amendment, respondent's analysis is directly inconsistent with *Salyer* itself, where the Court emphasized that "[a]ll of the costs of district projects [were] assessed against land by assessors in proportion to the benefits received" and that

[4] In fact, respondent makes only one substantive reference to the Fifteenth Amendment -- a grossly inaccurate claim that petitioner is required to prove the discriminatory intent of Hawaii's race-based voting restriction. Opp. 29 n.12. Despite this Court's clear holding that discriminatory intent need not be shown when the challenged state action is facially race-based, respondent studiously ignores the court of appeals' admission that "the voter qualification at issue here [is] clearly racial *on its face*." Pet. App. 15a (emphasis added).

because general tax dollars were not used, "there is no way that the economic burdens of district operations can fall on residents *qua* residents." 410 U.S. at 729.

IV. Respondent Fails To Identify A Single Authority To Support The Ninth Circuit's Novel Constraints On Judicial Review

Although all race-based laws are "presumptively unconstitutional" (*Bush v. Vera*, 517 U.S. 952, 976 (1996); *Shaw*, 509 U.S. at 642-43), respondent, citing no authority but the opinion below, argues that this Court must conclusively presume that the facially racial OHA laws are constitutional because petitioner "does not, and cannot," attack them. Opp. 26. Indeed, respondent goes so far as to argue that *Adarand* and *Croson* are irrelevant to this case because they applied the traditional presumption of unconstitutionality for race-based laws, not the novel presumption created by the court below. But the fact that the presumption adopted below is the exact opposite of this Court's teaching in *Adarand* and *Croson* shows that the Ninth Circuit was fundamentally wrong, not that this Court's decisions are irrelevant.

Moreover, this Court has consistently rejected arguments that a party can deprive the Court of authority to consider all laws it deems relevant to a case or controversy. "The contrary conclusion would permit litigants, by agreeing on the legal issue presented, to extract the opinion of a court on . . . dubious constitutional principles, an opinion that would be difficult to characterize as anything but advisory." *United States Nat'l Bank of Oregon v. Independent Ins. Agents*, 508 U.S. 439, 447 (1993).[5] Hawaii cannot insulate its race-based election

[5] Nor is it uncommon for this Court to take unchallenged provisions into account when assessing the constitutionality of challenged statutes. *See, e.g., Riley v. National Federation of*

laws from constitutional challenge merely by lodging them within an interrelated network of other constitutionally flawed racial laws.

At bottom, the decision below stands for the proposition that the existence of one racial classification serves to justify still further racial gerrymandering for the benefit of the same race. That stunning *non sequitur* cannot serve to immunize from judicial review the clearest example of racially discriminatory voting laws that has ever confronted this Court. If the words of the Fifteenth Amendment are to remain more than an empty promise, review must be granted in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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January 6, 1999

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the Blind, 487 U.S. 781, 799 (1988); *Village of Schaumburg v. Citizens for a Better Environment*, 444 U.S. 620, 639 (1980).

Supreme Court, U.S.
FILED
MAY 27 1999
CLERK

No. 98-818

In The

Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT APPENDIX

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Petition For A Writ Of Certiorari Filed November 17, 1998
Petition Granted March 22, 1999

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Exhibit A to Defendant's Reply Memorandum (Apr. 17, 1997) 11

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Exhibit A 35

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Exhibit C 55

* * *

The following decision, opinion, and order have been omitted from this joint appendix because they appear on the following pages of the printed petition for a writ of certiorari:

Decision and Opinion, United States Court of Appeals for the Ninth Circuit (June 22, 1998) 1a

Order Denying Plaintiff's Motion for Partial Summary Judgment; Granting Defendant's Motion for Partial Summary Judgment, United States District Court for the District of Hawaii (May 6, 1997) ... 19a

Denial of Petition for Rehearing and Rejection of Petition for a Rehearing En Banc, United States Court of Appeals for the Ninth Circuit (Aug. 20, 1998) 44a

Docket Entries

Harold F. Rice v. Benjamin J. Cayetano,
Governor of the State of Hawaii,
United States Court of Appeals for the Ninth Circuit,
Docket No. 97-16095

(as of Nov. 3, 1998)

6/19/97 DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. CADS SENT (Y/N): Y. setting schedule as follows: CADS is past due; CADS must be filed no later than 6/26/97; appellant's designation of RT is due 6/12/97; appellees' designation of RT is due 6/23/97; appellant shall order transcript by 7/2/97; court reporter shall file transcript in DC by 8/4/97; certificate of record shall be filed by 8/11/97; appellant's opening brief is due 9/18/97; appellees' brief is due 10/20/97; appellant's optional reply brief is due 14 days from service of the answering brief. [97-16095] (hh)

* * *

9/24/97 Filed order (Deputy Clerk: tah) Aplts late mtn for an extension of time in which to file the opening brief is denied. The opening brief and excerpts of record are due 10/2/97. The answering brief is due 11/3/97. The optional reply brief is due 14 days from service of the answering brief. Court records do not reflect the issuance of the certificate of record. Aplt shall monitor the DC's issuance of the certificate. [3306788-1] setting schedule as follows: appellants' opening brief, excerpts due 10/2/97; appellees' brief due 11/3/97,; [97-16095] (crw)

10/3/97 Received Appellant Harold F. Rice's brief in 15 copies 48 pages (Informal: no) deficient incomplete cert. of compliance: notified counsel. Served on 10/2/97 [97-16095] (crw)

* * *

10/17/97 Filed original and 15 copies Appellant Harold F. Rice opening brief (Informal: no) 48 pages

and five excerpts of record in 1 vol; served on 10/2/97 [97-16095] (crw)

11/7/97 Received Appellant Harold F. Rice letter dated 11/3/97 re:notification that the certificate of record was mailed by the DC to the USCA on 9/18/97. [97-16095] (crw)

11/10/97 Filed certificate of record on appeal RT filed in DC 9/17/97 [97-16095] (crw)

11/20/97 Filed original and 15 copies aples 45 pages brief,; served on 11/17/97 [97-16095] (crw)

11/20/97 Received Amici brief in 15 copies of 40 pages; deficient: mtn to file pending with promo; served on 11/17/97. [97-16095] (crw)

11/25/97 Filed motion and deputy clerk order: (Deputy Clerk: tah) The mtn of the Office of Hawaiian Affairs, et al for leave to file a late, substitute amicus curiae brief in support of aples shall be referred to the panel that considers the merits of the case. . . . . [3346904-1] (Motion recvd 11/20/97) [97-16095] (crw)

11/28/97 14 day oral extension by phone of time to file Appellant Harold F. Rice's reply brief. [97-16095] appellant's reply brief due 12/18/97; (terr)

* * *

12/19/97 Filed original and 15 copies Harold F. Rice reply brief, (Informal: no) 25 pages; served on 12/18/97 [97-16095] (crw)

12/19/97 Filed Appellant Harold F. Rice response opposing motion & order to become amicus [3346904-1] served on 12/18/97 RECORD FOR MERITS PANEL. [97-16095] (crw)

12/23/97 Filed, as of 11/10/97, certified record on appeal in 6 Vols. (total): 6 Clerks Rec (5 folders, 1 expando) (ORIGINAL) [97-16095] (crw)

* * *

3/31/98 Filed Amicus Office of Hawaiian, Amicus State Council of HI, Amicus Kamehameha Schools, Amicus Na Pua A Ke Alii, Amicus Assoc. of Hawaiian, Amicus Ha Hawaii, Hui, Amicus Native Hawaiian Adv., Amicus Native Hawaiian Lega's motion to participate in oral argument served on 3/30/98 [3423734] PANEL [97-16095] (crw)

* * *

4/9/98 Filed order (Deputy Clerk: gb) Amici's mtn to file substitute brief is granted. Rice's mtn to file a supp brief in response to the amici brief is denied. Amici's mtn to participate in oral argument is denied. [97-16095] (crw)

* * *

5/5/98 ARGUED AND SUBMITTED TO James R. BROWNING, Melvin BRUNETTI, Pamela A. RYMER [97-16095] (cv)

6/22/98 FILED OPINION: AFFIRMED (Terminated on the Merits after Oral Hearing; Affirmed; Written, Signed, Published. James R. BROWNING; Melvin BRUNETTI; Pamela A. RYMER, author.) FILED AND ENTERED JUDGMENT. [97-16095] (crw)

6/29/98 Filed Appellee Benjamin J. Cayetano, Appellee Mazie K. Hirono bill of costs for $244, served on 6/24/98 [97-16095] (crw)

7/6/98 Filed Appellant Harold F. Rice's motion to extend time to file petition for rehearing until 7/13/~~98~~ [97-16095] served on 7/1/98 [3481639] FAXED TO PANEL [97-16095] (crw)

7/7/98 [3484010] Received original and 40 copies Appellant Harold F. Rice petition, for rehearing with suggestion for rehearing en banc, deficient: no cert of compliance served on 7/6/98. Notified counsel. (crw)

* * *

7/20/98 [3491154] Filed original and 40 copies Appellant Harold F. Rice petition for rehearing with suggestion for rehearing en banc 10 pages, served on 7/17/98 PANEL AND ALL ACTIVE JUDGES. [97-16095] (crw)

8/20/98 Filed order (James R. BROWNING, Melvin BRUNETTI, Pamela A. RYMER): . . . . The petn for rehearing is denied and the suggestion for a rehearing en banc is rejected. [3491154-1] [97-16095] (crw)

8/27/98 MANDATE ISSUED; COSTS TAXED in the amount of $244.00. [97-16095] (sm)

Docket Entries

Harold F. Rice v. Benjamin J. Cayetano, Governor of the State of Hawaii,
United States District Court for the District of Hawaii, Docket No. 96-CV-390
(as of June 10, 1997)

4/25/96	1	COMPLAINT for declaratory and injunctive relief – (Summons(es) issued) (tbf) [Entry date 04/26/96]
4/25/96	2	ORDER by Judge Alan C. Kay rule 16 conference set for 8:30 7/22/96 before Mag Judge Barry M. Kurren (tbf) [Entry date 04/26/96]
6/10/96	3	First AMENDED COMPLAINT [1-1]; summons – terminating defendant Office of Hawaiian A – on behalf of pltf (mm) [Entry date 06/21/96]
6/24/96	4	RETURN OF SERVICE executed upon defendant Benjamin J. Cayetano thru Cindy S. Inouye, deputy atty general, on 6/18/96 (mm) [Entry date 07/01/96]
6/24/96	5	RETURN OF SERVICE executed upon defendant Mazie K. Hirono thru Cindy S. Inouye, deputy atty general, on 6/18/96 (mm) [Entry date 07/01/96]
7/3/96	6	APPLICATION by plaintiff for the convening of a three judge district court; certificate of service – referred to Judge David A. Ezra (byy) [Entry date 07/05/96]

* * *

7/17/96	8	REQUEST by plaintiff for recusal sua sponte (tbf) [Entry date 07/19/96]
7/17/96	9	Second AMENDED COMPLAINT [3-1] by plaintiff; summons – issued (tbf) [Entry date 07/19/96]

* * *

7/19/96	11	RETURN OF SERVICE executed upon defendant office of the lieutenant governor, state of Hawaii thru Marian E. Tsuji,

chief of staff for Mazie K. Hirono on 7/18/96 (tbf) [Entry date 07/23/96]

7/19/96 12 RETURN OF SERVICE executed on atty general for the state of Hawaii thru Diane K. Tairo, deputy atty general for Margery S. Bronster on 7/18/96 (tbf) [Entry date 07/23/96]

7/19/96 13 RETURN OF SERVICE executed the governor office thru Stafford T. Nagatani, executive asst for Ben Cayetano upon defendant Benjamin J. Cayetano on 7/18/96 (tbf) [Entry date 07/23/96]

7/22/96 14 EO: rule 16 conference set for 8:30 8/19/96 before Mag Judge Barry M. Kurren; Geomans to notify parties; (deft was recently served) (Ct Rptr:) JUDGE Mag Judge Barry M. Kurren (tbf) [Entry date 07/23/96]

7/24/96 15 ORDER by Judge David A. Ezra denying motion for the convening of a three judge district court and denying pltf's request for recusal sua sponte [6-1] (cc: all counsel) (tbf) [Entry date 07/25/96]

* * *

8/16/96 31 ANSWER to complaint; certificate of service – on behalf of deft Poka Laenui, as to cv 96-616DAE only (mm) [Entry date 08/22/96]

* * *

8/19/96 34 EP: rule 16 pt conference held on 8:30 8/19/96; Trial set for 9:00 5/13/97 before Judge David A. Ezra; final pretrial conference set for 8:30 4/10/97; fpt stmts 4/3/97; file m/join additional parties/amend pleadings 9/16/96; Motion filing ddl set

for 9/16/96; expert witness disclosure – a. pltfs 12/13/96, b. defts 1/13/97; Discovery ddl set for 3/13/97 before Mag Judge Barry M. Kurren; settlement conf on call (cc: Goemans, Matsushima) (Ct Rptr: No Record) JUDGE Mag Judge Barry M. Kurren (mm) [Entry date 08/26/96]

8/19/96 35 Report of SCHEDULING CONFERENCE and ORDER – by Mag Judge Barry M. Kurren (mm) [Entry date 08/26/96]

8/20/96 32 CERTIFICATE of service (mm) [Entry date 08/21/96] [Edit date 08/22/96]

8/21/96 33 Second STIPULATION enlarging time to file deft's answer or other responsive pleadings to pltf's second amended complaint; ORDER – by Judge David A. Ezra: enlarging time to answer from 8/15/96 up to and including 8/23/96 – on behalf of deft (mm) [Edit date 08/22/96]

8/22/96 36 State Defts' ANSWER to complaint fo[r] declaratory and injunctive relief filed 7/18/96; exhibits "a"-"d"; certificate of service – on behalf of defts, only as to cv 96-616DAE (mm) [Entry date 08/26/96]

8/22/96 37 Pltfs' REPLY to defts' memorandum in opposition to pltfs' motion for preliminary injunction; affidavit of Clara Pila Akana Leong Kakalia; affidavit of Stephen Teruo Kubota; affidavit of Billie Martha Mary Ah Ung Kawaiola Fernandez Beamer; certificate of service – on behalf of pltfs, only as to cv 96-616DAE (mm) [Entry date 08/26/96]

8/22/96 38 Pltf Harold F. Rice's Memorandum in REPLY to memoranda filed in opposition

to pltf's second amended complaint; certificate of service – on behalf of pltf (mm) [Entry date 08/26/96]

8/23/96 39 Deft's ANSWER to pltf's second amended complaint [9-1] filed 7/17/96; certificate of service – on behalf of deft Cayetano (mm) [Entry date 08/26/96]

* * *

10/18/96 55 State Defts' SCHEDULING CONFERENCE STATEMENT; certificate of service (mm) [Entry date 10/22/96]

* * *

2/26/97 59 NOTICE OF MOTION and motion by plaintiff for partial summary judgment; memorandum in support; affidavit of John W. Goemans; exhibit "a"; certificate of service – set for 10:30 4/28/97 before Judge David A. Ezra (tbf) [Entry date 03/03/97]

2/28/97 60 NOTICE OF MOTION and motion by defendant Benjamin J. Cayetano for partial summary judgment; memorandum in support of motion; exhibits "a"-"e"; CONCISE STATEMENT of facts in support of motion; certificate of service 0 set for 10:30 4/28/97 before Judge David A. Ezra (wn) [Entry date 03/05/97]

4/8/97 61 Separate Concise STATEMENT of facts by plaintiff Harold F. Rice in support of pltf's motion for partial summary judgment [59-1]; certificate of service (mm) [Entry date 04/10/97]

4/8/97 62 MEMORANDUM by defendant Benjamin J. Cayetano in opposition to "pltf Harold F. Rice's motion for partial summary judgment" [59-1] filed on 2/26/97; certificate of service (mm) [Entry date 04/10/97]

4/9/97 63 PRETRIAL STATEMENT by defendant Benjamin J. Cayetano; certificate of service (mm) [Entry date 04/15/97]

* * *

4/10/97 68 MEMORANDUM by plaintiff Harold F. Rice in opposition to deft's motion for partial summary judgment [60-1]; exhibit "a"; certificate of service (mm) [Entry date 04/15/97]

4/10/97 69 PRETRIAL STATEMENT by plaintiff Harold F. Rice; certificate of service (mm) [Entry date 04/15/97]

4/11/97 67 * * * final pretrial conference – not held; parties agree that case will be decided by motions; trial date and related deadlines vacated; status conference re remaining issues set for 8:30 6/16/97 before Mag Judge Barry M. Kurren (Ct Rptr: No Record) JUDGE Mag Judge Barry M. Kurren (mm) [Entry date 04/15/97]

4/17/97 70 Memorandum by plaintiff Harold F. Rice in REPLY to deft's memorandum in opposition to pltf's motion for partial summary judgment [59-1]; certificate of service (mm) [Entry date 04/22/97]

4/17/97 71 REPLY memorandum by defendant Benjamin J. Cayetano in support of "deft's motion for partial summary judgment" [60-1] filed on 2/28/97; exhibit "a"; certificate of service (mm) [Entry date 04/22/97]

4/28/97	72	EP: arguments; that the motion for partial summary judgment [59-1] is submitted, that the motion for partial summary judgment [60-1] is submitted (Ct Rptr: SP) JUDGE Judge David A. Ezra (wn) [Entry date 05/02/97]
5/6/97	73	ORDER by Judge David A. Ezra denying plaintiff's motion for partial summary judgment [59-1] and granting defendant's motion for partial summary judgment [60-1] (cc: all counsel) (wn) [Entry date 05/12/97]
5/12/97	74	JUDGMENT: by Walter A.Y.H. CHINN, Clerk/Warren N. Nakamura, Deputy Clerk – is hereby entered pursuant to the "order denying plaintiff's motion for partial summary judgment; granting defendant's motion [for] partial summary judgment," filed on 5/6/97 – terminating case (cc: David L. Ross, John W. Goemans, John P. Dellera, Winfred K.T. Pong, Deborah Day Emerson) (wn)
6/2/97	75	NOTICE OF APPEAL; certificate of service – by plaintiff Harold F. Rice from Dist. Court decision [74-2] (cc: all counsel) (byy) [Entry date 06/10/97]
6/2/97	--	RECEIVED re [75-1] fee in amount of $105.00 (Receipt #173774) (byy) [Entry date 06/10/97]
6/10/97	--	NOTICE OF APPEAL and copy of docket sheet sent to 9th CCA [75-1] (cc: all counsel) (byy)

Exhibit A

Defendant's Reply Memorandum
(Apr. 17, 1997)

107 STAT. 1510 PUBLIC LAW 103-150 – NOV. 23, 1993
Public Law 103-150
103d Congress

Joint Resolution

Nov. 23, 1993 [S.J. Res. 19]

To acknowledge the 100th anniversary of the January 17, 1893 overthrow of the Kingdom of Hawaii, and to offer an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii.

Whereas, prior to the arrival of the first Europeans in 1778, the Native Hawaiian people lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion;

Whereas a unified monarchical government of the Hawaiian Islands was established in 1810 under Kamehameha I, the first King of Hawaii;

Whereas, from 1826 until 1893, the United States recognized the independence of the Kingdom of Hawaii, extended full and complete diplomatic recognition to the Hawaiian Government, and entered into treaties and conventions with the Hawaiian monarchs to govern commerce and navigation in 1826, 1842, 1849, 1875, and 1887;

Whereas the Congregational Church (now known as the United Church of Christ), through its American Board of Commissioners for Foreign Missions, sponsored and sent more than 100 missionaries to the Kingdom of Hawaii between 1820 and 1850;

Whereas, on January 14, 1893, John L. Stevens (hereafter referred to in this Resolution as the "United States Minister"), the United States Minister assigned to the sovereign and independent Kingdom of Hawaii conspired with a small group of non-Hawaiian residents of the Kingdom of Hawaii, including citizens of the

United States, to overthrow the indigenous and lawful Government of Hawaii;

Whereas, in pursuance of the conspiracy to overthrow the Government of Hawaii, the United States Minister and the naval representatives of the United States caused armed naval forces of the United States to invade the sovereign Hawaiian nation on January 16, 1893, and to position themselves near the Hawaiian Government buildings and the Iolani Palace to intimidate Queen Liliuokalani and her Government;

Whereas, on the afternoon of January 17, 1893, a Committee of Safety that represented the American and European sugar planters, descendants of missionaries, and financiers deposed the Hawaiian monarchy and proclaimed the establishment of a Provisional Government;

Whereas the United States Minister thereupon extended diplomatic recognition to the Provisional Government that was formed by the conspirators without the consent of the Native Hawaiian

people or the lawful Government of Hawaii and in violation of treaties between the two nations and of international law;

Whereas, soon thereafter, when informed of the risk of bloodshed with resistance, Queen Liliuokalani issued the following statement yielding her authority to the United States Government rather than to the Provisional Government:

"I Liliuokalani, by the Grace of God and under the Constitution of the Hawaiian Kingdom, Queen, do hereby solemnly protest against any and all acts done against myself and the Constitutional Government of the Hawaiian Kingdom by certain persons claiming to have established a Provisional Government of and for this Kingdom.

"That I yield to the superior force of the United States of America whose Minister Plenipotentiary, His Excellency John L. Stevens, has caused United States troops to be landed at Honolulu and declared that he would support the Provisional Government.

"Now to avoid any collision of armed forces, and perhaps the loss of life, I do this under protest and impelled by said force yield my authority until such time as the Government of the United States shall, upon facts being presented to it, undo the action of its representatives and reinstate me in the authority which I claim as the Constitutional Sovereign of the Hawaiian Islands.".

Done at Honolulu this 17th day of January, A.D. 1893.;

Whereas, without the active support and intervention by the United States diplomatic and military representatives, the insurrection against the Government of Queen Liluokalani would have failed for lack of popular support and insufficient arms;

Whereas, on February 1, 1893, the United States Minister raised the American flag and proclaimed Hawaii to be a protectorate of the United States;

Whereas the report of a Presidentially established investigation conducted by former Congressman James Blount into the events surrounding the insurrection and overthrow of January 17, 1893, concluded that the United States diplomatic and military representatives had abused their authority and were responsible for the change in government;

Whereas, as a result of this investigation, the United States Minister to Hawaii was recalled from his diplomatic post and the military commander of the United States armed forces stationed in Hawaii was disciplined and forced to resign his commission;

Whereas, in a message to Congress on December 18, 1893, President Grover Cleveland reported fully and accurately on the illegal acts of the conspirators, described such acts as an "act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress", and acknowledged that by such acts the government of a peaceful and friendly people was overthrown;

Whereas President Cleveland further concluded that a "substantial wrong has thus been done which in due regard for our national character as well as the rights of the injured people requires we should endeavor to repair" and called for the restoration of the Hawaiian monarchy;

Whereas the Provisional Government protested President Cleveland's call for the restoration of the monarchy and continued to hold state power and pursue annexation to the United States;

Whereas the Provisional Government successfully lobbied the Committee on Foreign Relations of the Senate (hereafter referred [107 STAT. 1512 PUBLIC LAW 103-150 – NOV. 23, 1993]
to in this Resolution as the "Committee") to conduct a new investigation into the events surrounding the overthrow of the monarchy;

Whereas the Committee and its chairman, Senator John Morgan, conducted hearings in Washington, D.C., from December 27, 1893, through February 26, 1894, in which members of the Provisional Government justified and condoned the actions of the United States Minister and recommended annexation of Hawaii;

Whereas, although the Provisional Government was able to obscure the role of the United States in the illegal overthrow of the Hawaiian monarchy, it was unable to rally the support from two-thirds of the Senate needed to ratify a treaty of annexation;

Whereas, on July 4, 1894, the Provisional Government declared itself to be the Republic of Hawaii;

Whereas, on January 24, 1895, while imprisoned in Iolani Palace, Queen Liliuokalani was forced by representatives of the Republic of Hawaii to officially abdicate her throne;

Whereas, in the 1896 United States Presidential election, William McKinley replaced Grover Cleveland;

Whereas, on July 7, 1898, as a consequence of the Spanish-American War, President McKinley signed the Newlands Joint Resolution that provided for the annexation of Hawaii;

Whereas, through the Newlands Resolution, the self-declared Republic of Hawaii ceded sovereignty over the Hawaiian Islands to the United States;

Whereas the Republic of Hawaii also ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government;

Whereas the Congress, through the Newlands Resolution, ratified the cession, annexed Hawaii as part of the United States, and vested title to the lands in Hawaii in the United States;

Whereas the Newlands Resolution also specified that treaties existing between Hawaii and foreign nations were to immediately cease and be replaced by United States treaties with such nations;

Whereas the Newlands Resolution effected the transaction between the Republic of Hawaii and the United States Government;

Whereas the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum;

Whereas, on April 30, 1900, President McKinley signed the Organic Act that provided a government for the territory of Hawaii and defined the political structure and powers of the newly established Territorial Government and its relationship to the United States;

Whereas, on August 21, 1959, Hawaii became the 50th State of the United States;

Whereas the health and well-being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land;

Whereas the long-range economic and social changes in Hawaii over the nineteenth and early twentieth centuries have been devastating to the population and to the health and well-being of the Hawaiian people;

Whereas the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own

[PUBLIC LAW 103-150 – NOV. 23, 1993 107 STAT. 1513]

spiritual and traditional beliefs, customs, practices, language, and social institutions;

Whereas, in order to promote racial harmony and cultural understanding, the Legislature of the State of Hawaii has determined that the year 1993 should serve Hawaii as a year of special reflection on the rights and dignities of the Native Hawaiians in the Hawaiian and the American societies;

Whereas the Eighteenth General Synod of the United Church of Christ in recognition of the denomination's historical complicity in the illegal overthrow of the Kingdom of Hawaii in 1893 directed the Office of the President of the United Church of Christ to offer a public apology to the Native Hawaiian people and to initiate the process of reconciliation between the United Church of Christ and the Native Hawaiians; and

Whereas it is proper and timely for the Congress on the occasion of the impending one hundredth anniversary of the event, to acknowledge the historic significance of the illegal overthrow of the Kingdom of Hawaii, to express its deep regret to the Native Hawaiian people, and to support the reconciliation efforts of the State of Hawaii and the United Church of Christ with Native Hawaiians: Now, therefore, be it

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled,

SECTION 1. ACKNOWLEDGMENT AND APOLOGY.

The Congress –

(1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawaii on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people;

(2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii and the United Church of Christ with Native Hawaiians;

(3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawaii on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination;

(4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between

the United States and the Native Hawaiian people; and

(5) urges the President of the United States to also acknowledge the ramifications of the overthrow of the Kingdom of Hawaii and to support reconciliation efforts between the United States and Native Hawaiian people.

SEC. 2. DEFINITIONS.

As used in this Joint Resolution, the term "Native Hawaiian" means any individual who is a descendent of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawaii.

[107 STAT. 1514 PUBLIC LAW 103-150 – NOV. 23, 1993]

SEC. 3. DISCLAIMER.

Nothing in this Joint Resolution is intended to serve as a settlement of any claims against the United States.

Approved November 23, 1993.

LEGISLATIVE HISTORY – S.J. Res. 19:
SENATE REPORTS No. 103-126 (Comm. on Indian Affairs).
CONGRESSIONAL RECORD, Vol. 139 (1993):
Oct. 27, considered and passed Senate.
Nov. 15, considered and passed House.

Exhibit A

Plaintiff's Memorandum in Opposition to Defendant's Motion for Partial Summary Judgment
(Apr. 10, 1997)

OFFICE OF HAWAIIAN AFFAIRS

OHA BOARD OF TRUSTEES

The idea of an organization run by and for Hawaiians and managing Hawaiian assets was proposed at the 1978 constitutional convention and made a part of the state Constitution by the entire electorate of the state of Hawai'i, Hawaiians and non-Hawaiians alike.

OHA's overall mission was then, and is now, the betterment of conditions for all Hawaiians. It is designated the principal public agency of Hawai'i responsible for the performance, development and coordination of programs and activities relating to Hawaiians, except those within the jurisdiction of the Hawaiian Homes Commission.

The creation of the Office of Hawaiian Affairs, in fact, reflected a view of Hawaiians and their needs radically different from that held only a decade earlier. OHA's inception signaled a recognition of Hawaiians as the natives of these islands, entitled to the special legal and political considerations given indigenous people. OHA was a conceptual start toward remedying the illegal overthrow and the many social, economic and spiritual problems which resulted from it.

OHA is essentially an agency, a trust, and a government all rolled into one. Unlike Bishop Estate, the Department of Hawaiian Home Lands or the Queen's Health Systems, all of which have specific purposes, OHA's mission relates to all factors impacting the Hawaiian community, from education to housing to health to political involvement to sovereignty.

Over the years, OHA has established the following priorities: expanding its resource base, increasing recognition of OHA and the Hawaiian people within government and the community at large; enhancing and perpetuating Hawaiian culture and values; and service-oriented activities.

When Hawai'i was annexed in 1898, the self-proclaimed Republic of Hawai'i gave title, or ceded, to the United States about 1.8 million acres of the nation's crown and government lands, taken illegally in the overthrow. The Admission Act of 1959 transferred the ceded lands back to the new State of Hawai'i, reserving about 440,000 acres of land for federal use. Section 5(f) of the Admission Act said the lands were to be held as a public trust and revenue from their use or sale was to be devoted to any of five specific purposes, one of which was the betterment of conditions of native Hawaiians as defined by the Hawaiian Homes Commission Act, that is, of 50% or more blood quantum.

Section 5(f) was the principal argument for the creation of OHA. Prior to 1978, the ceded land revenues had been used for education, one of the other five purposes named in 5(f). The state claimed that the Hawaiian people were benefiting through the state public education system. At the 1978 Con Con, the Hawaiian Affairs Committee successfully argued that the intent of the law, which clearly named Hawaiians as a specific group to benefit from the trust, was not being met. After the electorate's ratification of OHA, the state Legislature established in Chapter 10, Hawai'i Revised Statutes, that OHA would be funded by a one-fifth, or 20 percent, share of ceded land revenue.

Because the trust funds are tied to a blood quantum requirement and OHA must serve all Hawaiians, OHA seeks money to match the trust funds, from the state Legislature, the federal government or private sources. In instances where the trust funds are not matched by OHA, OHA must ensure that their expenditure is for the betterment of conditions of native Hawaiians of 50% or more blood quantum. As set forth in the Constitution, OHA was structured to be governed by a nine member board of trustees, all Hawaiians elected by Hawaiians. To vote in OHA elections, you fill out an affidavit on the regular voter registration form that says you are eligible to vote in OHA elections.

The board comprises four members at-large and five from O'ahu, Maui, Moloka'i/Lana'i, and Kaua'i/Ni'ihau. Since the state Constitution stipulates that the members reside on, rather than represent, the islands, all trustees basically run in statewide contests. Trustees serve in staggered four-year terms, with four or five seats alternating in the general election every even-numbered year.

The Constitution and Chapter 10, which codified the enabling legislation for OHA, set forth the powers, duties and obligations of the board, which include managing and administering the assets of the trust, formulating policy, and exercising control over the Office of Hawaiian Affairs through an administrator appointed by the board.

OHA is frequently described as semi-autonomous. To the degree that OHA receives general funds from the Legislature as a match for trust funds, it is accountable to it. The trustees have absolute discretion over trust funds, however, and can set the policies for the office separate from

those established within the parameters of state government.

OHA trustees develop policies, oversee the execution of programs within OHA and oversee the use of trust funds. Duties include maximizing return on the trust through vigorous investment programs and overseeing trust-funded community programs for education, housing and grants. To maximize its resources and avoid duplication, OHA coordinates its efforts with other agencies and organizations, working with them to ensure appropriate delivery of services and to develop programs where gaps exist. OHA is a member of Hawaiian Service Institutions and Agencies (HSIA), together with Alu Like, Bishop Estate, Lunalilo Trust and Queen's Health Systems. As an instance of coordinating activities, OHA is taking the lead in developing a Hawaiian Master Plan that encompasses all HSIA members and beyond to the community in planning effective and appropriate delivery and/or development of services to the Hawaiian community.

In fact, OHA frequently collaborates with other Hawaiian agencies. For example, Alu Like provides business training for Hawaiians applying to OHA's Native Hawaiian Revolving Loan Fund Program. OHA has also provided operating expenses to Lunalilo Home, and the Economic Development Division is working with Lunalilo Home to increase the Home's fund development skills. In yet another instance, OHA and DHHL are collaborating on several programs, including a revolving loan program for Hawaiian homesteaders and development of a kupuna housing project in Waimanalo.

OHA has taken the position that the Hawaiian people have a right to self-determination and thus OHA supports a process which allows all the Hawaiian people to decide the form of self-governance, if any, they want. OHA maintains a seat on the Hawaiian Sovereignty Elections Council. HSEC is mandated by the Legislature to conduct a plebiscite on self-determination and arrange for a constitutional convention if the Hawaiian people vote to have one. OHA also provides half the funding for the Elections Council and its activities.

OHA BOARD OF TRUSTEES

Clayton Hee, Chairman & Trustee, O'ahu
Abraham Aiona, Vice-Chair & Trustee, Maui
Moanike'ala Akaka Trustee, Hawai'i
Rowena Akana Trustee-At-Large
Billie Beamer, Trustee-At-Large
A. Frenchy DeSoto, Trustee-At-Large
Kina'u Boyd Kamali'i, Trustee-At-Large
Moses K. Keale, Sr., Trustee, Kaua'i & Ni'ihau
Samuel L. Kealoha, Jr., Trustee, Moloka'i & Lana'i

Linda Colburn
Administrator
Sesnita A. Moepono
Deputy Administrator

OHA Home Page

OHA Background

The 1970s were a time of turmoil, nationally and locally. The values of the dominant culture were challenged by minorities of every kind in every American community. Racial minorities found new dignity in their native cultures and demanded equal treatment under the law.

Early in the decade, jumbo jets arrived in Hawai'i, quickly followed by jumbo hotels. In the next six years, the number of visitors in Hawai'i doubled.

The world shrank and Hawai'i boomed. New resorts, new highways and new subdivisions sprouted on virgin shores and sprawled into valleys and cane fields. Hawai'i's population grew by 25 percent during the decade.

The stress on local communities was felt most by rural Hawaiians. Their lives on the fringe of Hawai'i's expansion and development, in close contact with the land and sea, were suddenly shaken by eviction notices and "No Trespassing" signs. Landowners and developers sprinkled luxurious hideaway resorts and exclusive golf condominiums in the most remote and untouched corners of the islands. In many cases there was no place left for farmers and fisherman to go.

Many decided they were not going to leave without a fight. They organized themselves and fought eviction.

For the first time in almost 100 years the maka'ainana were standing up for their preferred way of life. Hawai'i would never be the same. The battles that followed are legendary:

- ❒ Kalama Valley farmer[s] organized themselves and fought eviction with noisy demonstrations and acts of civil disobedience
- ❒ Armed farmers prepared to die for their farmlands at Waiahole-Waikane;
- ❒ Niumalu on Kaua'i is defended;
- ❒ Hawaiians march for access and trail rights on the west end of Moloka'i;
- ❒ Kaho'olawe – where wave after wave of Hawaiians defied the Department of Defense to malama the wounded sacred island;
- ❒ Sand Islanders take a hopeless stand to preserve their fishing settlement on Sand Island;
- ❒ Beach access fights at Makena and Nukoli'i;
- ❒ Hale Mohalu falls to redevelopment.

The fast pace of growth in Hawai'i meant lands which had languished for years were suddenly targets for speculation and development.

Kuleana lands were challenged and lost.

It is against this historical backdrop of emerging pride and reclaiming of all that is Hawaiian with the national movement of social and cultural activism that the seeds for OHA, and other Hawaiian movement organizations were planted.

Hawaiian musicians, dancers and artists echoed the life-and-death struggles going on around them and Hokule'a gave new cultural pride to a generation of Hawaiians who began asking questions.

To get answers, several new organizations joined the ranks of older, more established ones and scholars, lawyers and researchers pored through law books, title records and legal histories to better understand the rights and entitlements of Hawaiians.

Attention then focused on the Alaska Native Claims Settlement Act, which returned 40 million acres of land to Alaskan natives and paid $1 billion into a trust fund for land which was not returned by the United States.

The birth of OHA

In 1977, an unprecedented series of "Puwalu Sessions" provided representatives from 28 organizations and many individual Hawaiians with an opportunity to discuss a wide range of Hawaiian issues.

The first session produced five top priority goals.

Opening remarks for the third session, by then State Supreme Court Chief Justice William Richardson, urged all Hawaiians to learn to use the courts to their advantage to redress grievances, to challenge adverse possession laws, and to assert gathering, access and water rights.

"Our courts," Richardson said, "have recognized that Hawai'i's land laws are unique in that they are based, in part, upon ancient Hawaiian tradition, custom and usage. This means that in some cases we can look to the practices of our ancestors as guidance to establish present day law."

Ordinary citizens became fluent in the legalese of the Constitution of 1840, the Great Mahele, the Kuleana Act, the Land Act of 1895, the Annexation Act, the Organic

Act, the Hawaiian Homes Commission Act and the Admissions Act.

In later sessions, island representatives were elected to serve as members of a mini-legislature, which prepared a set of legislative proposals called the Native Hawaiian Legislative Package.

In 1978, a Constitutional Convention was called to review <and revise where necessary< the functions and responsibilities of Hawai'i's government.

One hundred and two delegates, 90 of whom never held elected office, convened the "People's Con Con" for 60 days of arduous work. Trustee A. Frenchy DeSoto was one of those delegates, and served as chair of the Hawaiian affairs committee.

Delegates worked hard that summer to fashion amendments to the Constitution which gave birth to the Office of Hawaiian Affairs. They addressed the concern that the state was not properly using lands in the public trust. These lands <ceded to the U.S. after annexation and transferred to the state in 1959< were to be used for five purposes, one of which was to benefit native Hawaiians. Up to that point the state had largely ignored this responsibility.

Delegate recommendations, which were approved by the Convention as a whole and by a majority of Hawai'i's voters, were simple and straightforward:

❒ People to whom assets belong should have control over them;

❒ The Office of Hawaiian Affairs, a trust entity for all individuals whose ancestors were natives of the Hawaiian Islands prior to 1778, should be established to manage and administer the resources held for the benefit of Hawaiians, and to formulate policy for them;

❒ OHA will be independent from the executive and all other branches of government although it will assume the status of a state agency;

❒ The status of OHA will be unique and special and the office shall have the power to govern itself through a board of trustees;

❒ OHA shall be modeled after the University of Hawai'i, so it will have maximum control over its budget, assets and personnel.

In 1979, the Legislature enacted what is now Chapter 10, HRS, which implemented Article XII, Sections 5 and 6 of the Constitution, by creating a strong and semi-autonomous "self-governing corporate body."

The Office of Hawaiian Affairs

OHA then, is an agency, a trust and a government all at once. Its mission is the betterment of conditions of all Hawaiians and to provide Hawaiians with the opportunity for a better life and future.

In order to accomplish its mission, OHA's master plan sets the direction. OHA will:

❒ Coordinate programs for Hawaiians

❒ Provide programs for Hawaiians if none exist

❒ Advocate for Hawaiians

❒ Serve as a receptacle for reparations

This broad purpose is very different from organizations like Bishop Estate, the Department of Hawaiian Home Lands or the Queen's Medical Center. These organizations have specific purposes education, homesteading or health care while OHA reaches to all areas of the community.

The list of programs and services the agency offers is lengthy. It helps provide scholarships for students, loans for businesses, and houses for homesteaders. It advocates for Hawaiian water rights and supports legal efforts for Hawaiians to secure title to their land. It speaks on behalf of Hawaiians in Congress, the Legislature, and the City and County Councils and supports numerous cultural activities statewide. Its health division works closely with other agencies across the state to ensure that Hawaiian needs and values are taken into consideration when health policy is created.

The list of OHA activities is much larger than this. To detail all programs would take much more space than allotted here. However, in the next few pages some of OHA's more recent endeavors are listed along with some information about OHA finances. We hope that you take the time to look at this, both to enhance your knowledge of the office, and so you can take better advantage of what the agency has to offer.

OHA Home Page

Working for the betterment of a people

"In the past, OHA has shied away from beating its own drum. However, it is important that legislators, beneficiaries and the general public become more aware of OHA's accomplishments and the many positive ways in which OHA has impacted the community."

Linda Colburn, OHA Administrator

OHA assets are Hawaiian assets. Money that OHA receives is redirected to programs and services that directly, and indirectly, benefit all Hawaiians. OHA generally does not provide direct services but supports groups and agencies that do. To many Hawaiians this gives the impression that OHA is doing little for the community. Not so. OHA support for Hawaiians reaches to all corners of the state, from poi mills and self-help homes in Kaua'i, to community-based economic development projects in Ka'u. OHA funds also support agencies working for Hawaiians such as Alu Like, and the Wai'anae Diet, and promotes organizations striving to preserve the culture such as Na Kalaiwa'a Moku O Hawai'i that built the Makali'i voyaging canoe.

The following is a list of some of OHA's most important programs and the funds allocated in fiscal year 1995 to support these programs. This is not a comprehensive list; some smaller allocations are not included. Also, other trust funds are allocated by OHA trustees to specific projects that are not part of a particular division's budget. An example of this is the $2 million the board appropriated to support Punana Leo's efforts on the Big Island.

Other examples of such expenditures include OHA's support for the Makali'i voyaging canoe and Rocky Jensen's apprenticeship program. Some of the programs listed are funded entirely by trust funds. Other[s] have a match from private foundations, the state [or] federal governments.

HEALTH AND HUMAN SERVICES

- ❒ Wai'anae Diet – $80,000 in support for diet that incorporates Hawaiian traditional foods and values into an overall nutritional plan
- ❒ Alu Like – $596,000 to fund the project's multi-service system.

CULTURE

- ❒ Western Museums project – $10,000 for scholarships and support of conference to help bridge the gap between museums and the native communities whose artifacts are displayed.
- ❒ Makali'i canoe – $85,000 to support voyaging canoe on its trip to the Marquesas and back
- ❒ Rocky Jensen carving school – $30,000 to support apprenticeship program for Hawaiian carvers
- ❒ Hawaiian artisans directory – $4,000 to create a directory of native Hawaiian artists
- ❒ 'Aha No'eau – $125,000 to support conferences that bring together practitioners of different aspects of the culture. (i.e. lomi lomi, hula, etc.)
- ❒ Hana fishpond rebuilding – $10,000 to support Hana youth efforts to rebuild local fishpond walls

LAND AND NATURAL RESOURCES

❒ Hawaiian rights project – $80,000 in funds for legal assistance to Hawaiians with claims to land, natural resources and related entitlements
❒ Operation Blueprint – $50,000
❒ Federal liaison – $37,000
❒ OHA kuleana legal fund – $55,000
❒ Legal (Waiahole Ditch water) – $350,000
❒ NHLC Land Title Project – $630,548 to provide legal assistance to native Hawaiians defending land titles or interest in real property in Hawai'i.
❒ DHHL Individual Claims Panel – $350,000
❒ State Burials Program – $66,396

ECONOMIC DEVELOPMENT

❒ Native Hawaiian Revolving Loan Fund program – Nearly $4 million in support for loans to Hawaiians to start up businesses. (OHA has contributed $7.3 million to the program since it began in 1989.)
❒ CBED Grants – $150,000 for community based economic development groups statewide.
❒ CBED research – $10,000
❒ Technical assistance workshops – $25,000 for technical assistance workshops to provide revolving loan fund recipients with business development skills.

EDUCATION

❒ Early Education program – $132,000 for travelling preschool on Maui.
❒ Na Pua No'eau grant – $136,000 to assist the UH-Hilo program for gifted and talented Hawaiian children with statewide expansion plans

❒ Tutorial program – $172,000 in grants for tutorial programs in schools and community schools/associations to increase test point scores and grade point averages for
❒ Scholarship program – $50,000 in scholarships for students seeking post secondary education.
❒ 'Aha 'Opio – $27,000 to support youth Legislature program that teaches Hawaiian students how to become outstanding leaders in their communities and in government.

HOUSING

❒ Waimanalo kupuna housing project – to include low-income housing, commercial center and community center, $500,000 to begin pre-development work and to leverage an additional $2 million in funding
❒ Hawaiian homesteader loan program – $20 million allocated in 1994; to date $700,000 used to assist 25 families.
❒ Self-help housing administrative management costs – $7,500 per home: Waimea, Kawaihae, Hawai'i, 20 homes; Ho'olehua, Moloka'i, 20 homes; Maunalaha and Kahana valleys, O'ahu, 15 and 10 homes < $487,500
❒ Kalapana – $140,000 to rebuild a new community for Kalapana residents.
❒ Kaua'i Habitat for Humanity – $1.7 million 0% interest loan built 22 homes in 1995.

PLANNING

❒ Grants and Purchase of Services – $1,208,009 in grants to groups engaged in activities that benefit native Hawaiians

❒ Donations – $104,839 to support a donations program that assists native Hawaiians with survival funds in critical gap periods.

OHA Home Page

Exhibit A

Defendant's Motion for Partial Summary Judgment
(Feb. 28, 1997)

STANDING COMMITTEE REPORT NO. 59

Your Committee on Hawaiian Affairs was referred proposals numbered 405, 674 and 676 all relating to a public trust entity and the creation of new sections in Article XI. Your Committee on Hawaiian Affairs begs leave to report as follows:

This report covers Article XI, entitled "Hawaiian Home Lands," Article XVI, entitled "Schedule," Article X, entitled "Conservation and Development of Resources," and Article XIV, entitled "General and Miscellaneous Provisions."

All committee meetings were open to the public, and representatives of organizations and individual citizens interested in the above-mentioned proposals were invited to present their views on the subjects covered by the proposals at public hearings.

The following citizens presented their views:

Richard Hoke; Sid Quintal; Melvin Kalahiki; Mililani Trask; Keoni Agard; Georgiana K. Padeken; Christobel Kealoha; Joyce Kaiona; Karl A. Mowat; Glenn Davis; Walter Ritts; Rachel Kamakana; Clara Ku; Dr. Emmett Aluli; Rose Kamakani; Charles K. Maxwell; Christine Teruya; Katherine Deardon; Amelia C. Abreu; Tadao Suemori; Linda Moriarty; David Sprout; Charles Forward; Rosemary K. Smith; Herbert Kauhi; Andrew Vento; Nathen Kaleiwahea; Brenda L. Lee; Alika Cooper; Steve Kaneai Morse; Linda Dela Cruz; Herman Paakonia; Renwrick Tassil; Moanikeala Akaka; Charles Warrington; Sonny Kaniho.

Article XI is amended by deleting the title and adding a new title to read:

"[HAWAIIAN HOME LANDS] HAWAIIAN AFFAIRS"

Your Committee changed the title of Article XI in order to reflect the new format of this article which will now include areas beyond that of the Hawaiian home lands. Your Committee has included several new sections to Article XI that will affect all native Hawaiians. Previously Article XI applied only to those who could qualify for Hawaiian home lands and who were historically defined by the Hawaiian Homes Commission Act, 1920, as amended, as lessees based on a requirement of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778. In looking to the future, your Committee decided that it is of utmost importance to establish a trust entity that would be for all individuals whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778, the date that marks the arrival of Captain Cook to these shores. In the sections that follow, your Committee refers to all descendants, regardless of blood quantum, as being native Hawaiians. Your Committee determined that the time was ripe to establish a trust entity with an elected board of trustees that would control and manage the assets and inheritance, and financial assistance belonging to all native Hawaiians, and to formulate policy relating to their affairs. (See discussions of new Sections 5, 6 and 7 to Article XI.) Thus your Committee concluded that it should broaden the name of this article to reflect the concepts in the sections that follow.

Article XI is amended by adding a new section to read:

"PUBLIC TRUST

"Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XIV, Section 8 of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for those native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended, and the general public."

This new section recites the trust corpus of Section 5(b) and names the two principal beneficiaries established in Section 5(f) of the Admission Act — those native Hawaiians as defined by the Hawaiian Homes Commission Act, 1920, as amended, and the general public. Your Committee decided to include the words "as may be amended" to follow "Hawaiian Homes Commission Act, 1920, as amended," in order to permit the Constitution in the future to reflect the change, if any, in the qualification of blood quantum set forth in that Act for native Hawaiians. Although your Committee was tempted to change this outmoded rule from the 1920s, your Committee concluded that this responsibility should be assumed by the Office of Hawaiian Affairs.

The Admission Act does not specify what percentage of the trust shall be allocated to native Hawaiians of one-half blood. The committee members felt that the proportion should rightfully be based either on equal division or

at least on a percentage of the five purposes. The committee was unanimous in deciding that the pro rata share should not be based on population census or a percentum thereof.

Your Committee reviewed the history behind the trust set forth in Section 5(b) of the Admission Act in order to arrive at this recital.

As a result of the revolution on January 17, 1893, the crown lands, which belonged to the Hawaiian people, were ceded by the Republic of Hawaii to the United States. These lands were conveyed back to the State on Hawaii's admission to the Union pursuant to Section 5(b) of the Admission Act. Section 5(f) of the Admission Act created a trust of these public lands separate and apart from the lands defined as "available lands," by section 203 of the HHCA, 1920, as amended. Your Committee found that the section 5(f) trust created two types of beneficiaries and several trust purposes one of which is native Hawaiians of one-half blood.

Article XI is amended by adding a new section to read:

"OFFICE OF HAWAIIAN AFFAIRS;
ESTABLISHMENT OF BOARD OF TRUSTEES

"Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are native Hawaiians, in accordance with law. The board members shall be native Hawaiians.

There shall be not less than 9 members of the board of trustees; provided that each of the following islands have at least one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The Board shall select a chairman from its members."

Your Committee added this new Section 5 relating to the Office of Hawaiian Affairs and the establishment of an elected board of trustees in order to provide a receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and to create a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to native Hawaiians. Moreover, in looking to the future the office will be able to receive and administer any reparations money, which will probably be awarded to all native Hawaiians regardless of blood quantum.

Your Committee is unanimously and strongly of the opinion that people to whom assets belong should have control over them. After much deliberation and attention to testimony from all parts of the State, your Committee concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles. In order to insure accountability, it was felt that the board should be composed of elected members. This amendment provides for direct participation in the selection process of the board of trustees by all native Hawaiians. The committee determined that such participation will avoid the much-justified criticism which has been directed at the Hawaiian homes commission for, among other things, its inability to respond adequately to the needs of native Hawaiians of one-half

blood. The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary. The cost for electing the board of trustees would be nominal, provided it is held at the same time as the state general elections.

Finally, the committee agreed that the board should be elected by all the beneficiaries. Certainly they would best protect their own rights. Such a practice is in line with the basic principles of a democratic society. Your Committee decided that at least nine members were necessary to allow for the proper representation. Your Committee felt that it was important that there be some deference to island representation. Thus the committee included the specific provision requiring at least one representative from each of the following islands: Oahu, Kauai, Maui, Molokai and Hawaii. The committee felt that the legislature could arrive at a proper apportionment scheme for the remaining seats, although the committee did feel that an at-large election might suffice.

In addition, your Committee has delegated to the legislature the responsibility of implementing the election for the board. Your Committee did provide, in the transitory provision that follows, for the election to be held simultaneously with the general election. But the legislature is delegated the responsibilities of (1) determining the final apportionment scheme, (2) arriving at a method whereby voters will demonstrate proof that they are native Hawaiians, (3) developing procedures for registering qualified voters and (4) administering the ballot.

The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency. The chairman may be an ex officio member of the governor's cabinet. The status of the Office of Hawaiian Affairs is to be unique and special. The establishment by the Constitution of the Office of Hawaiian Affairs, with power to govern itself through a board of trustees (see Section 6, following), results in the creation of a separate entity independent of the executive branch of government. Moreover, the office shall have the power to hold title to all the real and personal property now or hereafter set aside or conveyed to it. The committee developed this office based on the model of the University of Hawaii. In particular, the committee desired to use this model so that the office could have maximum control over its budget, assets and personnel. The committee felt that it was important to arrange a method whereby the assets of Hawaiians could be kept separate from the rest of the state treasury. The committee learned that in the past there has been commingling of funds intended for native Hawaiians of one-half blood with other moneys in the state treasury. The committee felt it imperative that this practice stop.

Article XI is amended by adding a new section to read:

"POWERS OF BOARD OF TRUSTEES

"Section 6. The board shall exercise power in accordance with law, to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals, and income derived from whatever

sources for native Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 for those native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended; formulate policy relating to affairs of native Hawaiians, and exercise control over real and personal property set aside by state, federal, or private sources and transferred to said Board for Native Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board."

Your Committee decided to grant native Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare by granting to the board of trustees powers to "formulate policy relating to affairs of native Hawaiians." Your Committee created the board of trustees of the Office of Hawaiian Affairs in the Constitution to insure that it would handle the assets and financial affairs of native Hawaiians. It is intended that these powers will include the power to contract, to accept gifts, grants and other types of financial assistance and agree to the terms thereof, to hold or accept legal title to any real or personal property and to quality under federal statutes for advantageous loans or grants, and such other powers as are inherent in an independent corporate body and applicable to the nature and purposes of a trust entity for native peoples. These powers also include the power to accept the transfer of reparations moneys and land.

Your Committee included the provision that the board would select an administrative officer to handle the

management and operation of the office. The committee wanted to create a separate position for these activities so that such a person could be employed on a full-time basis.

In making this decision, your Committee intends that the Office of Hawaiian Affairs would be able to accept title to the Hawaiian home lands in the event that said lands are transferred to it for administrative or any other purposes.

The committee intends this section to be broad enough to include within its scope the administration and management of the native Hawaiian land trust created by the Hawaiian Homes Commission Act of 1920. The Hawaiian Homes Commission Act, which provides for the administration of the Hawaiian home lands by the Hawaiian homes commission, was adopted as state law in Article XI of the Hawaii State Constitution in 1959. The Hawaiian home lands was created by the Act of 1920 whereby Congress set aside 200,000 acres of land in Hawaii for the rehabilitation and resettlement of native Hawaiians of one-half blood, under the management of the Hawaiian homes commission. It was felt at that time that only a return to the land could halt the sharp decline in numbers and the unfavorable trends in economic and social disorganization that were becoming apparent among the Hawaiian people. Title to these Hawaiian home lands remained with the United States prior to Statehood but was vested in the State of Hawaii upon the admission of Hawaii into the Union.

Pursuant to Section 6, the board of trustees could assume the trust responsibilities of the Hawaiian homes

commission. Since Section 202 of the Hawaiian Homes Commission Act provides for the establishment of the Hawaiian homes commission, it constitutes the principal section which would have to be amended in order to eliminate the present practice of appointing commissioners and substituting therefor the elective model provided for in Section 5.

In accordance with section 7(b) of Public Law 86-3, 86th Congress, Section 4 of the Admission Act became a part of Article XI, Hawaii State Constitution, at the election held on June 27, 1959, allowing Section 202 and other provisions relating to administration to be amended without congressional consent in the Hawaii State Constitution. The consolidation of the two trusts under the control and management of a single board would facilitate the attainment of the objective of the trusts: to provide for the betterment of the conditions of native Hawaiians. Such a merger would avoid duplication and waste of administrative expenditures.

Furthermore, this section empowers the board to administer and manage the pro rata share of assets derived from the public lands granted to those native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended, under Section 5(f) of the Admission Act.

Your Committee concluded that these Sections 5 and 6, taken together, are of utmost importance for they provide for accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people.

Unlike the Act and the section 5(f) trust, this trust is established for the benefit of all native Hawaiians, including those defined as native Hawaiians under the Hawaiian Homes Commission Act, 1920, as amended, and the restoration of their culture. The committee recognizes the right of native Hawaiians to govern themselves and their assets by their assumption of the trust responsibility imposed on the State to better their condition.

Article XI is amended by adding a new section to read:

"DEFINITION: NATIVE HAWAIIAN

"Section 7. Native Hawaiian means any individual any of whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778.

"Native Hawaiians of one-half blood means any individual of not less than one-half part of the blood of races inhabiting the Hawaiian Islands previous to 1778."

Your Committee decided to add this new section defining native Hawaiians in order to clarify any ambiguity that might exist. Since 1920, native Hawaiians have been defined only in the Hawaiian Homes Commission Act, 1920, as amended, in Section 201(7), which states: "The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Native Hawaiians of one-half blood will not be a subgroup under this definition. The committee believes that the time has come to include all native Hawaiians, regardless of blood quantum, for the number of descendants is increasing. This qualification has proved to be a

factor in dividing the Hawaiian community — mothers and fathers from their children, cousins from cousins, friends from friends. Moreover, the removal of a blood qualification will be in line with the current policy of the federal government to extend benefits for Hawaiians to all Hawaiians regardless of blood quantum.

Your Committee believes that this division among people who are of the same blood and may even be parent and child is not right or fair. The committee felt that the rule may even put undue pressure on a person's choice of who to bear children with. Your Committee took notice of the history of the two generations intervening between 1920 and 1978, which included two generations of further interracial offspring. Thus a rationale that may have had legitimacy in 1920 has now become outmoded.

Article XVI is amended by adding a new section to read:

"EFFECTIVE DATE FOR OFFICE OF HAWAIIAN AFFAIRS

"Section . The legislature shall provide for the implementation of the amendments to Article XI in Sections 5 and 6 on or before the first general election following ratification of the amendments to Article XI in Sections 5 and 6."

Your Committee added this new section to Article XVI in order to provide for implementation of the election of the board of trustees to the Office of Hawaiian Affairs. Your Committee felt that the election could be most economically held at the same time as a general election. Moreover, to have implementation of the

amendments to Article XI on or before the first general election following ratification would give the legislature adequate time to develop the necessary procedures.

Section 5 of Article X relating to farm and home ownership is amended to read:

"That pro rata portion of the [The] public lands set aside for the general public in Section 4 of Article XI, hereof, shall be used for the development of farm and home ownership on as widespread a basis as possible, in accordance with procedures and limitations prescribed by law."

The committee has amended this section in order to conform it to the general intent and purpose of new Sections 4 and 6 of Article XI which grant control over the trust created for those native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended, in Section 5(b) of the Admission Act to the Office of Hawaiian Affairs. It is the remaining pro rata share of the public lands belonging to the general public that should be managed under this section. The policy governing the portion which was set aside for the betterment of native Hawaiians will be dealt with exclusively by the Office of Hawaiian Affairs. Section 8 of Article XIV relating to compliance with trust is amended to read:

"Section 8. Any trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied by

appropriate legislation. Such legislation shall not diminish or limit the benefits of native Hawaiians under Section 4 of Article XI."

The Committee decided to amend this section to once again conform another section of the Constitution to the policies and powers set forth in Article XI, Section 4, relating to the public trust, and Section 6, relating to the powers of the board of trustees of the Office of Hawaiian Affairs. Therefore your Committee recommends: (1) that the above-numbered proposals referred to your Committee be filed; and (2) that Committee Proposal No. 13* pass first reading in the form shown.

Signed by all members of the Committee except Delegates Alcon and Hagino.

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* For the complete text of this proposal, see Committee Proposal No. 13, page 812.

Exhibit B

Defendant's Motion for Partial Summary Judgment
(Feb. 28, 1997)

COMMITTEE OF THE WHOLE REPORT NO. 13

Your Committee of the Whole, to which was referred Stand. Com. Rep. No. 59 of the Committee on Hawaiian Affairs and Com. P. No. 13, entitled "A Proposal Relating to Hawaiian Affairs," having held a meeting on September 2, 1978 and having fully debated and considered the report and proposal, begs leave to report as follows:

The proposal covered a new title and four new sections to Article XI, which were considered together with a new section to Article XVI and amendments to Section 5 of Article X and Section 8 of Article XIV. Only one amendment was offered to Com. P. No. 13. The action taken is set forth as follows.

An amendment to the new Sections 4, 5, 6 and 7 of Article XI, reading as follows, was offered:

"PUBLIC TRUST

"Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XIV, Section 8 of the State Constitution, excluding therefrom lands defined as 'available lands' by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for [those] native Hawaiians[, as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended,] and the general public."

"OFFICE OF HAWAIIAN AFFAIRS;
ESTABLISHMENT OF BOARD OF TRUSTEES

"Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are [native] Hawaiians, in accordance with law. The board members shall be [native] Hawaiians. There shall be not less than 9 members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The Board shall select a chairman from its members."

"POWERS OF BOARD OF TRUSTEES"

"Section 6. The board shall exercise power in accordance with law, to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 for [those] native Hawaiians [as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended]; formulate policy relating to affairs of native Hawaiians and Hawaiians, and exercise control over real and personal property set aside by state, federal, or private sources and transferred to said Board for [Native] native Hawaiians and Hawaiians. The board shall have the power to exercise control

over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board."

"DEFINITION: HAWAIIAN; NATIVE HAWAIIAN

"Section 7. The term [Native] "Hawaiian" means any [individual any of whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778.] descendant of the races inhabiting the Hawaiian Islands, previous to 1778.

"[Native Hawaiians of one-half blood] The term "native Hawaiian" means any [individual] descendant of not less than one-half part of the blood of races inhabiting the Hawaiian Islands previous to 1778[.] as defined by the Hawaiian Homes Commission Act, 1920, as amended or may be amended."

Recommendation: Your Committee recommends adoption of this amendment. There was no objection to this amendment.

This amendment is considered housekeeping in nature. It clarifies the definitions in the amended Section 7 of Article XI. The amendment will assist the delegates and all readers in readily understanding this section. The term "Hawaiian" includes all Hawaiians. The group of Hawaiians traditionally referred to as "native Hawaiians" continues to follow the definition of the Hawaiian Homes Commission Act, 1920, as amended. It is important to qualify that definition by including the phrase "or may be amended" so as to allow the Constitution to reflect any changes that could possibly occur in this Act.

The new Sections 4, 5 and 6 to Article XI have been conformed to this improved definitional section. There has been no change in content.

No other amendments were offered to Com. P. No. 13. However, your Committee did consider the merits of this proposal.

Members were impressed by the concept of the Office of Hawaiian Affairs which establishes a public trust entity for the benefit of the people of Hawaiian ancestry. Members foresaw that it will provide Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare and promote the protection and preservation of the Hawaiian race, and that it will unite Hawaiians as a people.

The present Hawaiian population is a young one. Approximately 50 percent of the total Hawaiian population is under the age of 70. The Hawaiian people today should be given the opportunity to provide for the betterment of the condition and well-being of these young Hawaiians and to address the contemporary problems that Hawaiians face – crime, inadequate housing conditions, welfare rolls and education. This proposal gives Hawaiians, a great and proud people, the opportunity and the means to do so. Your Committee feels that it is time the Hawaiians have more impact on their future.

Your Committee found that the Office of Hawaiian Affairs is appropriately modelled after that of the University of Hawaii so as to give it maximum independence. The most important aspect of this model is the power to govern itself. The public trust entity provides a democratic process for the beneficiaries in order to insure

accountability and opportunity for scrutiny of the trustees by the beneficiaries. It is an umbrella organization that is designed to embrace native Hawaiians and Hawaiians, the management of their assets and resources, the receipt of any future benefits, and possibly the administration of the department of Hawaiian home lands.

Your Committee of the Whole agreed with the reasoning of the Committee on Hawaiian Affairs regarding the election of the board of trustees. Your Committee felt that the legislature could best handle the further details necessary for the apportionment scheme. Proof of ancestry could also be determined by the legislature, although members did suggest several methods: birth certificates, genealogies, sworn statements and testimony of others. Your Committee concluded the elections would be constitutional, for the beneficiaries should rightfully have control and influence over their assets and future.

Moreover, it appears that the Committee on Hawaiian Affairs closely examined this issue. If one looks to the precedent of other native peoples, one finds that they have traditionally enjoyed self-determination and self-government. They have power to make their own substantive rules in internal matters. Although no longer possessed of the full attributes of sovereignty, they remain a separate people with the power of regulation over their internal and social problems. The establishment of the Office of Hawaiian Affairs is intended to grant similar rights to Hawaiians. The qualification for office and for exercising the franchise does not constitute discrimination. Rather it is a criterion reasonably

designed to further the cause of Hawaiian self-government and to make the Office of Hawaiian Affairs more responsive to the needs of its constituents. It is directed to participation by the governed in the governing agency. This qualification does not cover any other government agency or activity. In conclusion, these provisions are constitutional due to the unique legal status of Hawaiians. (See Santa Clara Pueblo, et al. v. Julia Martinez, et al., 48 L.W. 4412 (5/16/78); Morton v. Mancari, 417 U.S. 535 (1974).)

Your Committee of the Whole recommends the adoption of Com. Whole Rep. No. 13 and consideration of the passage of Com. P. No. 13, RD. 1, on second reading.

Exhibit C

Defendant's Motion for Partial Summary Judgment
(Feb. 28, 1997)

Debates in Committee of the Whole on

HAWAIIAN AFFAIRS

Committee Proposal No. 13

(Articles XI [X], XII [XI], XVI [XIV] and XVIII [XVI])

Chairman: DELEGATE HARTWELL BLAKE

Saturday, September 2, 1978 • Evening Session

The Committee of the Whole was called to order at 5:12 p.m.

Delegate Blake presided as Chairman.

CHAIRMAN: The Committee of the Whole will come to order. The Convention has referred Committee Proposal No. 13 to this Committee of the Whole for consideration. There is only one amendment, which will be marked No. 1. The first title is "Public Trust," the next is "Office of Hawaiian Affairs; Establishment of Board of Trustees," and the third title is "Powers of Board of Trustees." Does everybody have that amendment? At this time, the Chair would like to call a 5-minute recess.

At 5:20 p.m., the Committee of the Whole stood in recess subject to the call of the Chair.

The Committee of the Whole reconvened at 5:25 p.m.

CHAIRMAN: The Committee of the Whole will please come to order. The Convention has referred Committee Proposal No. 13 to this Committee of the Whole for consideration. We have before us an amendment submitted by Delegate De Soto. This is purely an administrative amendment. If there's no objection from the floor, I

would like to have the delegates go through this amendment here before we get into any other discussion. Is there any objection from the floor? Delegate De Soto.

DELEGATE DE SOTO: Mr. Chairman, the amendment before this body for consideration, coupled with my encouragement for the adoption of Committee Proposal No. 13, is a matter of housekeeping. This proposal attempts to define, as the committee intended, the terms "native Hawaiian" and "Hawaiian." It does this through sections 4, 5, 6 and 7 of Committee Proposal No. 13. I encourage the adoption of this amendment.

DELEGATE WAIHEE: Second the motion, Mr. Chairman.

CHAIRMAN: It has been moved and seconded that the amendment be adopted. Is there any discussion on the amendment? The question – all in favor of this amendment say aye. Opposed, no. The ayes have it. The motion is carried.

At this time, I have to remind you again about procedures. Again I ask you to be courteous to one another – and by courtesy I don't mean reading the newspaper or talking to one another o. joshing around on the side. And if we entertain this courtesy, maybe we can be out of here by 6:00. Also, again the Chair will recognize everyone who wishes to speak. As you all know, there will be roll calls if necessary. At this time, the Chair recognizes Delegate De Soto.

DELEGATE DE SOTO: Mr. Chairman, I speak in favor of Committee Proposal No. 13 relating to Hawaiian affairs, which establishes a public trust entity for the

benefit of the people of Hawaiian ancestry. I am again honored to stand on this convention floor and speak on behalf of the Committee on Hawaiian Affairs, our constituencies and the many citizens who testified at our public hearings in support of Committee Proposal No. 13.

Mr. Chairman, as you well know, and fellow delegates, I was elected from District 21A, the Waianae Coast – the home of the largest Hawaiian community in the State of Hawaii. Forty-five percent of the residents of the Waianae Coast are of Hawaiian ancestry – a Hawaiian constituency of more than 12,000. It is no wonder, then, that Committee Proposal No. 13 is very close to my heart and to my mind.

The primary purpose of proposal 13 is to grant to Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare. Proposal 13 amends Article XI of the Constitution of the State of Hawaii by including in Article XI that portion of the trust created by Section 5(f) of the Admission Act for the benefit of native Hawaiians. It establishes the Office of Hawaiian Affairs and an elected board of trustees to administer the trust created for the benefit of all Hawaiians. The board of trustees is granted the authority to formulate policy relating to the affairs of all Hawaiians. It unites Hawaiians as a people and allows Hawaiians to affirmatively better their condition by giving them the opportunity to assume the trust obligation imposed on the State by Section 5(f) of the Admission Act and to discharge the trust obligation by careful assessment and planning for the future welfare of all Hawaiians. The goal of the Office of Hawaiian Affairs is to address the modern-day problems of Hawaiians which are rooted in as

dark and sad a history as will ever mark the annals of time.

Before the advent of the foreigner, the Hawaiians had succeeded in developing a culture that was truly remarkable. They took from the 'aina and from the sea for sustenance. In the words of Ralph S. Kuykendall, one of the most thorough of the historians of Hawaii, Hawaiians were "a healthy, robust, intelligent, and good tempered folk" who lived religiously, arduously and intelligently.

As evidenced by the feats of the Hokule'a, the pre-Captain Cook Hawaiians were great sailors, traveling long distances in canoes. They were great navigators, with an almost mystic knowledge of the stars. They were great fishermen. They were great farmers and engineers. In the raising of taro, the Hawaiians perfected a technique of building irrigation ditches, a feat requiring no little industry and ingenuity, which has never been improved on. They were great doctors, skilled in the use of herbs. They were a great and proud people.

The land system before the coming of the foreigner was inseparably a part of religion and government. To destroy one was to destroy the other. The Hawaiians worshipped nature, which expressed itself in a system of rules – kapus – that regulated their daily lives. The islands were divided into kingdoms, each ruled by a king. In land matters, as in many others, the king's words were supreme. Part of the land the king reserved for himself for his own private use; the rest he portioned out to his subordinates, who in turn portioned it out to their subordinates, all the way down to the hoa'aina, who tilled the soil.

In the life the Hawaiians lived before the foreigners, there was no future orientation. The gods were immediate to the common people and so were the kings: they gave directly and took away directly. Tomorrows were only a succession of todays. This was, thought the Hawaiian, as it should be; it was all he knew. If you took away his religion, his government, if you took him away from the 'aina or from the economy that he knew, you destroyed him. And many people did do this.

With the first real influx of foreign invaders near the end of the 18th century, the change from the Hawaiian subsistence economy – and with it the whole cultural structure – to an exchange economy began at an astonishingly accelerated speed. Mr. Chairman, by 1820, when the first missionaries arrived, Kamehameha II had formally abolished the kapu system, thus knocking the props from under the old system of religion. The fur trade, the sandalwood trade, the whaling trade, and their accompanying influences had already infected the native culture and had neglected to provide any healing power.

The new ideas and practices, incomprehensible to the Hawaiians yet powered irresistibly by the superior prestige and force of the invaders, broke the force of the old kapu system. It also weakened the tie between the commoners and the chiefs, who had been their leaders from time immemorial.

By 1840, native morale had all but been destroyed. The new ways may have been superior, but to Hawaiians this was little compensation for the destruction of the old and the familiar. Thousands of Hawaiians died. From the missionary estimate in 1826 to the official Hawaiian

census in 1919, the number of full-blooded Hawaiians had decreased from 142,650 to 22,500, while the Hawaiian death rate had correspondingly increased until it exceeded considerably the death rate of any other race inhabiting the Islands at that time.

Mr. Chairman, the Hawaiian had become hopelessly land-less. All the stories that have been told with respect to the Great Mahele and that divisioning of land – finally the inevitable happened: our mo'i wahine Queen Liliuokalani was dethroned – a bloodless revolution but a queen deposed, a legitimate monarchy overthrown. Many, many injustices have been documented in our history. All these injustices have caused us now to stand in public and bare our souls once more, bare our souls so that someone, someplace will begin to listen.

Mr. Chairman, fellow delegates, if there must be a statement of need before Committee Proposal No. 13 is accepted or adopted by this Convention, then surely the following statistics indicate it: according to the 1975 census updates, the present Hawaiian population is a young one; there are roughly 60,000 Hawaiians, or approximately 54 percent of the total Hawaiian population, who are under the age of 20. It is my dream and the dream of my people that the Hawaiian today be given the opportunity to provide for betterment of the condition and well-being of these young Hawaiians, to address the contemporary problems which Hawaiians face – of crime, inadequate housing conditions, welfare rolls, education. Committee Proposal No. 13, Mr. Chairman, I submit, attempts to build the steps for native Hawaiian people so that they may realize, or at least decide some point in, self-determination.

All kinds of people have helped us in the planning. Your Committee on Hawaiian Affairs begs this Convention to consider, and submits that this native Hawaiian office is essential for the protection and the preservation of the Hawaiian race. I ask all of you to consider this and adopt this proposal. Mahalo.

CHAIRMAN: Thank you, Delegate De Soto. Any further discussion? Delegate Kaapu.

DELEGATE KAAPU: Mr. Chairman, do you propose we take this section by section or shall we take the proposal in its entirety?

CHAIRMAN: We will take it in its entirety.

DELEGATE KAAPU: This makes it considerably easier and a lot faster. The proposal of a Hawaiian trust is analogous to creating an entity like that of the University of Hawaii, which has the power to hold and own property, to create and administer programs and to govern itself under certain general laws of the State as well as the Constitution.

Its need is not in order to bring about immediately, by the enactment of this proposal, any new benefits to Hawaiians, but to do as the Constitution ought, which is to set the framework by which resources can be managed and benefits achieved through setting the frame by which those who are to receive and enjoy these benefits might in some democratic manner govern the disposition of these resources and settle on policies among themselves through the process of election and through the process of scrutiny by those to whom they are responsible. That in general is what the proposal for a Hawaiian trust

creates. There are several sections which I'll touch on quickly.

First is the change in the article title in the Constitution to reflect the broader scope of the concerns it now handles. Secondly, there is a redefinition of the public trust, of those elements in the Admission Act which are of benefit to Hawaiians, by setting forth clearly what those two categories of beneficiaries are to make it more easily handleable to administer – and that is, that the beneficiaries of the public trust under Section 5(f) are in fact the general public and native Hawaiians. The next section is on creation of the Office of Hawaiian Affairs and establishment of a board of trustees. The Office of Hawaiian Affairs would of course be that administrative body that would handle all the programs; and it is so constructed that it might handle both programs from which the benefits are directly present – to only those of one-half Hawaiian ancestry as well as to those of any part-Hawaiian ancestry. It allows for an umbrella organization which could someday embrace the Hawaiian homes commission, all of the Hawaiian home lands department and all the functions. It also provides a receptacle for the possible receipt and administration of any reparations that might be coming in the future.

The board of trustees is created as the governing body. It's to be made up of beneficiaries who are native Hawaiians themselves under the broader definition of that meaning. Also of that term, it sets forth that each Island shall be represented and the legislature shall determine the means by which the board is elected, and the qualifications and means by which those qualifications are proven. In other words, the legislature will determine

the details during the implementation period, which is 2 years after ratification of this act and which would provide for the election of directors of the Hawaiian trust, to take place at the next general election subsequent to that time.

The next section defines "native Hawaiian." We have further amended this definition so that the language would be clear in all documents related to that. We have already talked about the effective date for establishment of the Office of Hawaiian Affairs, which is set forth in the next section, and there is a statement that any legislation "shall not diminish or limit the benefits of native Hawaiians . . . " in case that was contemplated by any. That in essence is the nature of the Hawaiian trust entity, which is dictated and demanded by the ease of modern resource management more than anything else. But it does have the added benefit of allowing those who are direct beneficiaries to set their own policies and govern their own affairs through a democratic process.

CHAIRMAN: Thank you, Delegate Kaapu. Does anyone else wish to speak on the subject? Delegate Peterson.

DELEGATE PETERSON: I'm happy to speak a few words in favor of this proposal. I think it's time that native Hawaiians have more impact on their own future, and the transfer to Hawaiians of the responsibilities of self-government is only right and proper. I think that the extension to Hawaiians of all the rights without having a limitation of blood is only a proper extension of these other benefits. So I'm pleased to speak in favor of this proposal.

CHAIRMAN: Thank you, Delegate Peterson. Delegate Sakima.

DELEGATE SAKIMA: Mr. Chairman, I have a couple of questions that are really bothering me.

CHAIRMAN: Would you state the questions one at a time, please.

DELEGATE SAKIMA: I'm sure someone in the Hawaiian affairs committee can answer this: does this meet the constitutional question of having an election for just people of one race in this State? Having an election for those of Hawaiian ancestry only?

DELEGATE WAIHEE: I'll answer that question, if I may. I believe it meets the test because what we have here is that we're dealing with a trust entity and we're delegating the running of the trust to the beneficiaries, which is the normal setup when you're setting up a trust like this, where you elect the board of directors for the trust. I think that the provision itself also allows the legislature to work out the apportionment problem – to thereby get around any problems we might have with a one-vote, one-man situation. I think as far as the election itself is concerned, I believe – and I think the legal counsel concurs with the committee – that it would be constitutional.

DELEGATE SAKIMA: My other concern, Mr. Chairman – although in the committee report it says this is going to be similar to the University of Hawaii, the university comes under the legislature and this, I've noted, is a very autonomous body. It's almost like another county. So I'm just wondering whether we are not going to have another county formed in the State of Hawaii.

DELEGATE KAAPU: Mr. Chairman, in answer to that, I used the analogy of the university only in that it is a body that may hold and receive property, receive gifts, administer programs and conduct its own affairs under general law, and under the legislature in that case. To that extent it is analogous; beyond that, it is a trust that administers to its own beneficiaries only those resources to which it is already entitled. It may additionally receive appropriations from the legislature, but under those conditions it would be subject to such provisions as the legislature would make.

CHAIRMAN: With regard to legal counsel, this has cleared with legal counsel. Any further discussion? Delegate Barr.

DELEGATE BARR: Mr. Chairman, I would like to address the concern that was just raised. In the Constitution as it exists now, there are a couple of sentences that I think are instructive. In Section 2 of Article XI, it states: "The State and its people do further agree and declare that the spirit of the Hawaiian Homes Commission Act looking to the continuance of the Hawaiian homes projects for the further rehabilitation of the Hawaiian race shall be faithfully carried out." And at the end of Section 3, one of those "Provided Thats" that I didn't mention earlier when I spoke, is, provided "that all proceeds and income from the 'available lands', as defined by said Act, shall be used only in carrying out the provisions of said Act."

It seems to be clear that it was the intent of the Admission Act that we recognize a special claim, a special interest on the part of an aboriginal people in these

Islands. And if that effect sets up a separate county, or a separate trust, or a separate university or whatever, it is well past time that we take that step so that we as people meet the obligation that we have to do justice to that aboriginal people.

CHAIRMAN: Thank you, Delegate Barr. Delegate Sterling.

DELEGATE STERLING: May I add to that? The basic interest of Congress, to rehabilitate the Hawaiian people, continues and the errors of the Hawaiian Homes Commission Act, 1920, were rectified by setting up a second trust in the Admission Act. Rather than attempt to draft a second rehabilitation program, Congress delegated the task to the state legislature. The first such legislation in Hawaii was House Bill No. 1469 of the ninth state legislature, 1977, a bill to provide for a native Hawaiian program, governed by a board of trustees who would be native Hawaiians, elected by native Hawaiians in several regions throughout the State. But this bill for a native Hawaiian program was confronted with Section 97, relating to the budget, and it failed because of that.

This was part of the Admission Act. But we set this up, as the chairman so beautifully stated, as the receptacle not only to comply with the Admission Act but for any other possible benefits that may be coming to the Hawaiian people.

CHAIRMAN: Thank you, Delegate Sterling. Delegate Uyehara.

DELEGATE UYEHARA: Mr. Chairman, I have one concern that I'd like someone to answer for me.

CHAIRMAN: Would you state your concern.

DELEGATE UYEHARA: I'm concerned about the language in establishing the board of trustees. As I read it, according to this wording the nine persons who will be elected – it doesn't say how long their terms will be, and I'm wondering if they are going to be forever or if there is some kind of provision that states that there's a rotation of those who are elected.

DELEGATE CROZIER: Mr. Chairman, may I answer that? There are the words "in accordance with law." That's how it's going to be done, the legislature is going to make the final decision on that.

CHAIRMAN: Does that answer your question?

DELEGATE KAAPU: One additional point, Mr. Chairman: it also says "not less than 9 members," so it could be, Mr. Chairman, that there could be more, depending on the legislature.

CHAIRMAN: Any other discussion? Delegate Burgess.

DELEGATE BURGESS: Mr. Chairman, I have a point of information I'd like to address to anyone who can answer it.

CHAIRMAN: State your point of information, please.

DELEGATE BURGESS: The question is on Section 4, which says that the lands granted to the State by Section 5(b) of the Admission Act – and those are the lands that are referred to as "crown lands" – would be administered by the trust. My question is – what lands are those,

what's the area involved, and are those presently all the lands owned by the State of Hawaii, or a portion?

CHAIRMAN: You're on the first page, are you not?

DELEGATE BURGESS: Yes, I'm looking at the first page of the committee proposal, on Section 4, "Public Trust," the second line. Those are crown lands – the lands granted to the State by Section 5(b) of the Admission Act – those, as I understand it, are crown lands. I want to know specifically what lands are entailed – all the lands presently owned by the State of Hawaii? or if not, what approximate portion are they? What lands we are putting into the trust is what I want to know.

CHAIRMAN: Delegate De Soto.

DELEGATE DE SOTO: Mr. Chairman, I will attempt to answer that question. We're not taking any lands and putting them into any kind of trust, just grabbing lands from the State, or any place else. In the Admission Act, it identifies those lands as "available lands" as defined by said act; and all proceeds to come from these available lands shall be used only in carrying out the provisions of said act. These lands are identified in the Admission Act as "available lands," so they may have been ceded lands or public lands.

CHAIRMAN: Delegate Burgess, does that answer your question?

DELEGATE BURGESS: No, Mr. Chairman, my question is – what lands are covered by this second line of Section 4? It excludes available lands, so it's not the available lands – those are different. I'm trying to find out about the crown lands. It's my understanding – and this

may be wrong – that the crown lands are now owned by the State of Hawaii; they are a substantial part of the lands presently owned by the State.

DELEGATE STERLING: Mr. Chairman, may I continue what the chairman was saying? The largest –

CHAIRMAN: Yes, Delegate Silva?

DELEGATE SILVA: I'd like to ask for a short administrative recess.

CHAIRMAN: SO ORDERED.

At 5:52 p.m., the Committee of the Whole stood in recess subject to the call of the Chair.

The Committee of the Whole reconvened at 5:55 p.m.

CHAIRMAN: The Committee of the Whole will come to order. Delegate Burgess, was your inquiry answered?

DELEGATE BURGESS: Yes, it was, thank you.

CHAIRMAN: Is there any other discussion on the floor? Delegate Goodenow.

DELEGATE GOODENOW: Mr. Chairman, I am very much in favor of this, but I have one question that I must ask which has to do with Section 7, the definition of "native Hawaiian." I need some information on this. Is there a system set up to establish the relationship between today and 1778? Have there been records kept, or what is the answer to this?

CHAIRMAN: Delegate Crozier.

DELEGATE CROZIER: I was going to say if the delegate had looked at her amended copy, there is a definition in the back there. She's looking at the old copy.

CHAIRMAN: Just for your information before we move on, Delegate Goodenow, the amendment that was on the floor clarifies "native Hawaiians" and "Hawaiians." One is by blood quantum and the other isn't. This trust will embrace all. However, Hawaiians under the Hawaiian Homes Commission Act will still continue with the things that they are entitled to or under the Organic Act or the act set up by the U.S. Congress. Delegate Kaapu.

DELEGATE KAAPU: Mr. Chairman, I think the question may have run a little bit beyond that and that is that – and the answer would be, all of those who are now qualified for the Hawaiian homes program would be native Hawaiians for all of the other programs that don't require blood quantum, but some of the Hawaiians will not qualify presently for Hawaiian homes. However, when it comes to voting and determinations of who is Hawaiian, the question of how that is proven often comes up. In this proposal, the matter is left to the legislature to determine the procedure whereby that may be done. Among the many procedures that are known are statements, birth certificates, testimony by those who know, court records and other things. But the legislature is left with the discretion of setting up procedures for determining that.

CHAIRMAN: Delegate Goodenow, has your question been answered?

DELEGATE GOODENOW: Yes, thank you.

CHAIRMAN: Delegate Waihee.

DELEGATE WAIHEE: I just wanted to clarify for those of us – Delegate Burgess was satisfied with his answer, but to clear the record so the rest of us know what transpired in our little secret caucus here – what we need to make clear is that this proposal does not transfer to the trust any state lands. What is concerned is that Section 5(f) of the Admission Act sets out categories of individuals or persons who are to receive the revenues from all public lands that were given to the State of Hawaii. Now these categories are generally like agriculture, education and one category in there, one of the five categories (or two, depending how you look at it) is native Hawaiians. So what the trust would do would be to mandate the section of these revenues from public lands which are to be given which are presently mandated by the Admission Act to be held in trust for Hawaiians – would be transferred directly into this new entity which we are calling the Hawaiian affairs trust. So what we're talking about in this paragraph is not the transfer of lands but the transfer of revenues that are generated by public lands.

The second part of the article, Section 6 I believe, which talks about the disposition of lands and so forth in the rest of this proposal, is futuristic. What we are allowing here is for the corporate entity, or this trust entity that would be established – allowing this trust entity to have the ability to own and receive gifts of land, including, maybe – if we ever get anything from – reparations. This vehicle would have that ability. So I think if we clarify this – we're not taking away any public lands, we're merely directing some of the revenues that are supposed to go to the Hawaiian people.

CHAIRMAN: For all the delegates present, that was what Delegate Burgess' inquiry was and the answer given by Delegate Waihee. Any other discussion?

DELEGATE WAIHEE: If there is no further discussion, I move that we rise and report to the Convention that we recommend adoption of Committee Proposal No. 13 with one amendment.

DELEGATE BARR: Second.

CHAIRMAN: It has been moved and seconded that we rise and report that we recommend adoption of Committee Proposal No. 13, with one amendment. Those in favor say aye. Opposed, say no. The motion is carried. I want to commend the group for the courtesy and quiet.

At 6:03 p.m., the Committee of the Whole stood in recess subject to the call of the Chair.

Supreme Court, U.S.
FILED
MAY 27 1999
CLERK

No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit an explicit racial classification restricting the right to vote in statewide elections for state officials.

PARTIES TO THE PROCEEDINGS

All of the parties to the proceedings in the court of appeals are listed in the caption.

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BRIEF FOR PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 146 F.3d 1075. The opinion of the district court (Pet. App. 19a-43a) is reported at 963 F. Supp. 1547.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 1998. A petition for rehearing was denied on August 20, 1998. Pet. App. 44a. The petition for a writ of certiorari was filed on November 17, 1998, and was granted on March 22, 1999. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The pertinent provisions of the Fourteenth and Fifteenth Amendments to the United States Constitution, the Constitution of the State of Hawaii, the Hawaii Admission Act, and the Hawaii Revised Statutes are reproduced at App. 1a-8a.

STATEMENT OF THE CASE

The State of Hawaii has violated two of our Nation's most fundamental constitutional guarantees: the right to vote, and the right to be free from government-sponsored race discrimination. Hawaii imposes an explicit racial restriction on the right to vote in statewide elections for the governing board of the Office of Hawaiian Affairs (OHA). Under Hawaii law, only descendants of the races that inhabited the Hawaiian Islands before 1778—the year Captain Cook arrived in the Islands—may vote in those elections. Haw. Rev. Stat. §§ 10-2,

13D-3. OHA is a state agency that receives millions of dollars of legislative appropriations from general tax receipts as well as revenues from public lands. It uses those funds to provide services and financial assistance to two racially defined classes of Hawaiian citizens: "native Hawaiians," defined as those descendants of the "races inhabiting the Hawaiian Islands previous to 1778" of not less than 50 percent "Hawaiian blood"; and "Hawaiians," defined as those with any "Hawaiian blood." Petitioner—whose family has resided in Hawaii since the mid-nineteenth century and who himself was born and lives in Hawaii as a citizen, taxpayer, and qualified elector of the United States and the State of Hawaii—was denied the right to vote in the 1996 election for OHA's board *solely* because he does not meet the State's racial definition of "Hawaiian."

A. Hawaii And Its Public Lands

In 1778, at the time of Captain Cook's voyage to the Hawaiian Islands, governance of the Islands was fragmented among numerous groups, which were often at war with each other. Hawaii was first organized as a unified, sovereign, independent kingdom in 1810, and remained as such until 1893, when its monarch abdicated and was replaced by a provisional government. The provisional government declared itself the Republic of Hawaii and ultimately sought annexation to the United States. In 1898, Hawaii became a territorial possession of the United States.

As a result of annexation, approximately 1,800,000 acres of "public, Government, or Crown lands"—*i.e.*, lands previously owned either by the government of the Hawaiian Kingdom or the Hawaiian monarchy in its official capacity—were ceded by the Republic of Hawaii to the United States. J. Res. 55, 55th Cong., 30 Stat. 750 (1898) (Annexation Resolution). At the time of their transfer, these "public lands" were held by the Republic of Hawaii free and clear of any encumbrances or trust obligations. None of the former citizens of the Hawaiian

kingdom held any cognizable interest in these lands. *See In re Estate of His Majesty Kamehameha IV*, 2 Haw. 715, 1864 WL 2485, at *2-5 (1864) (detailing division of land rights among the Crown, the nobility, and the citizenry); *see also Hawaiian Homes Commission Act, 1920: Hearings on H.R. 13500 Before the Senate Comm. on Territories*, 66th Cong., 3rd Sess. 134 (1921) ("There can be no doubt . . . that when these Crown lands were ceded to and accepted by the United States, they were ceded and accepted free and clear of any trust whatever.") (statement of Hawaiian attorney general); *Liliuokalani v. United States*, 45 Ct. Cl. 418, 426-29 (1910) (Hawaiian law limited all interest in the Crown lands to the office of the monarch, and "[w]hen the office ceased to exist [in 1893] they became as other lands of the Sovereignty and passed to the [United States]" without encumbrance).

The Annexation Resolution provided that all revenues or proceeds of the ceded public lands (except for certain portions reserved for the United States) must "be used solely for the benefit of *the inhabitants of the Hawaiian Islands* for educational and other public purposes." 30 Stat. 750 (emphasis added). The Resolution thus did not impose any race-based restrictions on the use of the ceded public lands or the proceeds therefrom. At that time the population of Hawaii was racially diverse, with only 36.3 percent of the inhabitants identified as racial "Hawaiians" or "Part Hawaiians." *See* Robert C. Schmitt, *Demographic Statistics of Hawaii: 1778-1965* at 74 (1968) (census figures for 1896). The remaining population consisted primarily of individuals who were identified as Caucasian, Portuguese, Chinese, or Japanese. *Id.* at 62-63, 74; *see also* Romanzo Adams, *The Peoples Of Hawaii* 8-9 (1933).

In 1900, Congress formally established the Territory of Hawaii. Hawaiian Organic Act, ch. 339, § 2, 31 Stat. 141. The Organic Act confirmed that the public lands ceded to the United States would remain in the posses-

sion of the territorial government for public works and other public purposes. It also provided that "[a]ll funds arising from the sale or lease or other disposal of [the public] lands shall be appropriated by the laws of the government of the Territory of Hawaii and applied to such uses and purposes for the benefit of *the inhabitants of the Territory of Hawaii* as are consistent with the [Annexation Resolution]." *Id.* § 73, 31 Stat. 155 (emphasis added). Thus, like the Annexation Resolution, the Organic Act provided for administration of the public lands proceeds in entirely race-neutral terms.

In 1921, Congress set aside one-ninth, approximately 200,000 acres, of the ceded public lands for use in a "homestead" leasing program aimed at "rehabilitating the Hawaiian race." H.R. Rep. No. 67-236, at 1 (1921); *see* Hawaiian Homes Commission Act (HHCA), 42 Stat. 108 (1921).[1] These so-called "available lands" were to be made available for long-term, nominal-price leases to "native Hawaiians," a group defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7), 42 Stat. at 108. The "available lands" and their proceeds are controlled by the Department of Hawaiian Home Lands, not OHA (Haw. Rev. Stat. § 10-3), and therefore are not subject to the racial voting restriction for OHA board elections.

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[1] During hearings on the HHCA, the Attorney General of the Hawaiian territory, a proponent of the bill, reviewed the history of the crown lands and concluded: "[T]his proposed legislation can be sustained, if at all, not upon any theory that the Hawaiian people ever had any equitable right or title to these lands, but only upon the . . . purpose of rehabilitating a race of people who, through circumstances, perhaps beyond their control, are in danger of extermination." *Hawaiian Homes Commission Act, 1920: Hearings on H.R. 13500 Before the Senate Comm. on Territories*, 66th Cong., 3rd Sess. 134.

Hawaii became a State in 1959. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4. The Admission Act conveyed the ceded public lands (including the 200,000 acres of HHCA "available lands") to the new State of Hawaii, and provided that these public lands would be held by the State in trust for the "public" and would be "managed and disposed of for one or more" of five specified purposes: "[1] for the support of the public schools and other public educational institutions, [2] for the betterment of the conditions of native Hawaiians, as defined in the [HHCA], [3] for the development of farm and home ownership on as widespread a basis as possible[,] [4] for the making of public improvements, and [5] for the provision of lands for public use." *Id.* at § 5(f). Hawaii, however, was not required to undertake to achieve all—or any particular one—of these five purposes. *Id.*

From 1959 until the creation of OHA in 1978, the State administered the public lands (other than the "available lands" subject to the HHCA) for the benefit of all Hawaiian citizens, without regard to race. Most of the public lands proceeds were used for the support of public education. Pet. App. 5a; 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

B. The Office Of Hawaiian Affairs

Hawaii's treatment of the public lands proceeds changed in 1978, with the creation of OHA. OHA is an agency of the State of Hawaii created to provide services to "[n]ative Hawaiian[s]" (*i.e.*, "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778") and "Hawaiian[s]" (*i.e.*, "any descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands . . . in 1778, and which peoples thereafter have continued to reside in Hawaii"). Haw. Rev. Stat. § 10-2.

OHA offers a wide range of services to these two racially-defined classes, including identifying "physical,

sociological, psychological and economic needs," organizing and implementing programs to meet those needs, and interacting as a state agency with federal and private entities and with other state agencies. Haw. Rev. Stat. §§ 10-6, 10-4; *see also* OHA Annual Report, 1998 at 10-33 (describing broad range of OHA functions, including health and human services, education programs, housing assistance, and economic development).

Since 1978, the Hawaiian Constitution has required that OHA board members be "elected by qualified voters who are Hawaiians, as provided by law." Haw. Const. art. XII, § 5. OHA's implementing statute also provides that "[n]o person shall be eligible to register as a voter for the election of [OHA] board members unless the person . . . is Hawaiian." Haw. Rev. Stat. § 13D-3(b). In each case, the State has adopted legislation defining "Hawaiian" exclusively in racial terms: descendants of the races inhabiting the Hawaiian Islands prior to 1778. Haw. Rev. Stat. § 10-2; *see* Pet. App. 6a, 15a. Excluded from voting are the more than 85 percent of Hawaiian residents who are Asian, white, black, Hispanic, and other races. *See* United States Department of Commerce, Bureau of the Census, *1990 Census of Population, General Population Characteristics, Hawaii* Table 3 at 5 (1992).

OHA oversees two funds, each administered on racial grounds. The first is composed primarily of legislative appropriations from general tax revenues that are administered by OHA for both "native Hawaiians" and other racial "Hawaiians." *See* OHA Annual Report, 1993-94 at 5. For the last five years for which audited figures are available, legislative appropriations for OHA have totaled $17,735,147. L. 8 at 54, 56; L. 9 at 10; L. 10 at 10, 13 (OHA Financial Statements, 1993-1997).[2]

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[2] Twelve copies of all documents with "L." cites have been lodged with the Office of the Clerk of the Court.

The second fund, which contains the bulk of OHA's assets, consists of 20 percent of the proceeds from the ceded public lands. *See* Haw. Rev. Stat. § 10-13.5. During the same five-year period, OHA received a total of $133,989,270 in proceeds from the public lands. L. 8 at 54, 56; L. 9 at 10; L. 10 at 10, 11 (OHA Financial Statements, 1993-1997). While OHA's annual appropriations from the Hawaiian legislature are expended on behalf of both "native Hawaiians" and "Hawaiians," the public lands receipts may be expended *only* for the benefit of "native Hawaiians." *See* 83-2 Haw. Att'y Gen. Op., 1983 WL 41853 (Apr. 15, 1983); L. 6 at 5 (OHA Annual Report, 1993-94) (setting forth OHA's policy of limiting beneficiaries to those with 50 percent or more "native blood" whenever a project is funded solely by public lands proceeds, but opening class of beneficiaries to everyone with any "native blood" if public lands proceeds are matched by funds appropriated by the state legislature or other sources).[3]

Within these race-defined parameters, OHA board members have broad discretion in administering these funds. *See* L. 6 at 5 (OHA Annual Report, 1993-94) ("Although OHA is technically part of the Hawai'i state government, it operates as a semi-autonomous entity. It is run by nine trustees, all Hawaiians elected by Hawaiians. Its operating budget is approved by the state legislature, but trustees have discretion over trust funds."). The amount of funds controlled by OHA is very substantial. As of the end of fiscal year 1997, for example, OHA controlled a total fund balance in excess of $238,000,000, most of which is held for the sole benefit

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[3] According to OHA's figures, only approximately 39 percent of racially defined "Hawaiians" (80,953 out of 208,476) pass the 50 percent blood quantum requirement. L. 4 (*Native Hawaiian Data Book 1998*, Table 1.14).

of "native Hawaiians." L. 10 at 6 (OHA Financial Statement, 1996-97 at 10).

C. Hawaii's Denial Of Petitioner's Right To Vote

Petitioner, who was born in Hawaii and whose family has lived in Hawaii since before its annexation by the United States, does not satisfy the *racial* requirements for "native Hawaiian" or "Hawaiian" status. *See* Haw. Rev. Stat. §§ 10-2, 13D-3. In March 1996, he applied to vote in the August 1996 election for the OHA board. The registration form contained the following declaration: "I am also Hawaiian and desire to register to vote in OHA elections." L. 2; Pet. App. 6a-7a. Petitioner crossed off the phrase "am also Hawaiian and," and marked "yes" on the form.[4] Although petitioner meets all requirements for voting except the racial requirement, the State denied his application. *Id.* at 7a.

D. The Proceedings Below

1. Petitioner filed suit in the United States District Court for the District of Hawaii, contending that he had been denied his right to vote in elections for the OHA board because of his race, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution. Pet. App. 9a, 19a. In his Second Amended Complaint, petitioner sought, *inter alia*, a declaratory

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[4] It is undisputed that the reference to "Hawaiian" on this registration form did not encompass all Hawaiian citizens, but was instead limited to racial "Hawaiians." *See* L. 2. Hawaii has since amended the form to make the race requirement even more explicit. L. 3. The forms also require a sworn declaration of the registrant's race, made under the threat of criminal penalties. L. 2, 3; Haw. Rev. Stat § 19-3.5 ("Any person who knowingly votes when the person is not entitled to vote" or "knowingly takes an oath . . . authorized by law and willfully makes any false statement of fact" "shall be guilty of a class C felony" punishable by up to 5 years imprisonment and a $10,000 fine).

judgment that the race-based voting qualification violated the Fourteenth and Fifteenth Amendments, and an injunction barring respondent and all his "officers, agents, employees, attorneys and all those in active concert or participation with him from conducting any election in which the franchise is qualified by race." Second Amended Complaint, p. 8.

On May 6, 1997, the district court entered summary judgment against petitioner. Pet. App. 19a-43a. The court held that because the United States and the State of Hawaii had undertaken a "special relationship" with the descendants of the races that inhabited Hawaii before 1778, the State's restriction on the franchise to individuals with "Hawaiian blood" was merely a "political" distinction, subject only to rational basis review. The court further held that the OHA voting limitation was rationally related to fulfilling Hawaii's "trust responsibility" to racial "Hawaiians," and that the OHA election was a "special purpose" election within the meaning of *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

2. The court of appeals affirmed. Pet. App. 1a-18a. Although the court held that "the Hawaiian Constitution and Haw. Rev. Stat. § 13D-3 contain a racial classification on their face" and that the voting restriction was "clearly racial" (Pet. App. 11a, 15a), it nonetheless rejected petitioner's Fifteenth Amendment claim, concluding that OHA board elections are "special purpose" elections under *Salyer* and therefore are not "general election[s] for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." *Id.* at 12a, 15a.

The court also held that under *Morton v. Mancari*, 417 U.S. 535 (1974), the race-based voting restriction was primarily "political" and therefore subject only to rational basis review. According to the Court, "the special treatment of Hawaiians and native Hawaiians" involved the "establishment of trusts for their benefit . . .

similar to the special treatment of Indians . . . approved in . . . *Mancari*." *Id.* at 13a-14a.

Applying rational basis review, the court asserted that it is "rational" for the State to prohibit non-racial "Hawaiians" from voting in elections for the OHA board "in light of its trust responsibilities for Hawaiians and native Hawaiians." Pet. App. 17a. In the alternative, the court held that Hawaii's racial voting restriction would survive strict scrutiny because Hawaii has a "compelling" interest in "honor[ing] the trust," and because "the restriction on voter eligibility is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" *Id.*

The court justified these conclusions by holding that because petitioner's challenge focused on the denial of his right to vote and was not an across-the-board challenge to the existence of OHA or Hawaii's 1978 racial set-aside of public lands proceeds for "native Hawaiians," those programs "must" be conclusively presumed to be both constitutional and of the utmost importance. Pet. App. 9a. The court thus restated the issue before it as whether elections for OHA's board can legitimately be limited to the beneficiaries of the "trust." In this way, the court purported to transform what it had initially recognized to be a "clearly racial" voting restriction into a classification that is "not primarily racial, but legal or political." *Id.* at 10a.

SUMMARY OF ARGUMENT

Hawaii's racially discriminatory election laws are a direct, open, and undisguised affront to the Fifteenth Amendment. That Amendment—which uncompromisingly declares that the "right of citizens . . . to vote shall not be denied or abridged by the United States or by any State on account of race"—precludes all facially racial voting restrictions. In 1978, Hawaii chose to ignore that

clear prohibition by expressly depriving all racial groups except racial "Hawaiians" of the right to vote in statewide elections for the governing board of OHA, a state agency that annually expends millions of dollars of public funds. No more obvious violation of the Fifteenth Amendment is possible, and there is no construction of the OHA election laws that can cleanse them of their unconstitutional racial content. The Fifteenth Amendment commands that they be struck down.

The court of appeals' holding that the OHA board elections are exempt from review under the Fifteenth Amendment is irreconcilable with this Court's precedents. The court's reliance on the "special purpose" election exception to the Fourteenth Amendment's one-person-one-vote rule announced in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), is entirely misplaced. There is no support for applying *Salyer*—a case that involved neither the Fifteenth Amendment nor race-based classifications—to a case that involves both. The plain terms of the Fifteenth Amendment demonstrate that its prohibition on racial voting restrictions "includes any election in which public issues are decided or public officials selected" (*Terry v. Adams*, 345 U.S. 461, 468 (1953)), a category that plainly encompasses elections for the OHA board.

The OHA racial election laws fare no better under the Fourteenth Amendment. As with its reliance on *Salyer*, the court of appeals' use of *Morton v. Mancari*, 417 U.S. 535 (1974), to shield those laws from strict scrutiny under the Fourteenth Amendment is patently wrong. *Mancari* is predicated upon a constitutionally derived "special relationship" that this Court has expressly limited to federally recognized Indian Tribes, and permits only classifications based on *tribal membership*, not classifications based upon *race*. As respondent has asserted (Opp. 18) and the court of appeals has acknowledged (Pet. App. 14a), the racial "Hawaiians" to whom OHA elections are restricted are not members of a

federally recognized Indian Tribe, and the classification here is racial, not tribal. *Mancari* does not apply.

Strict scrutiny reveals that the State's two purportedly compelling interests in electoral discrimination—honoring the "trust" created by Section 5(f) of the Admission Act, and ensuring adherence to fiduciary principles by the OHA board—are woefully inadequate. There is no record evidence that racial "Hawaiians" suffer the present effects of past or present race discrimination—the only basis for upholding a racial classification recognized by this Court. Nor is there any support in the Constitution or this Court's jurisprudence for the Ninth Circuit's assumption that the mere existence of the OHA laws purporting to define the "trust" in racial terms is sufficient to justify racially discriminatory voting laws. Moreover, neither Section 5(f) nor the overall OHA scheme creates any need whatsoever for raced-based elections, and race is irrelevant to the performance of any fiduciary duties associated with the "trust." In any event, race discrimination at the polls is not narrowly tailored to achieve the proffered interests, especially in light of the ease with which Hawaii administered the "trust" on a race-neutral basis for almost two decades.

The Ninth Circuit also erred in purporting to seal off from judicial scrutiny the racial classification at issue here by announcing the hitherto unknown proposition that when a challenged law shares a constitutionally suspect attribute with an unchallenged (and therefore presumptively constitutional) law, the challenged law becomes constitutional as well. This sweeping new concept is fatally inconsistent with the doctrine of strict scrutiny and with this Court's settled jurisprudence. Moreover, the court of appeals' theory is irrelevant to this case because such presumptions have no place in Fifteenth Amendment analysis, and because even if the laws establishing the OHA "trust" were presumed constitutional, they could not justify the State's imposition of a race-based voting scheme.

Hawaii's patently race-based denial of the right to vote is the most egregious violation of the Fifteenth Amendment to reach this Court in many decades. The Ninth Circuit's rewriting of this Court's voting rights and equal protection jurisprudence to uphold Hawaii's racial discrimination would lead to the approval of all manner of racially discriminatory laws and amounts to an abdication of meaningful judicial review. The judgment of the court of appeals should be reversed.

ARGUMENT

I. HAWAII'S RACIAL VOTING RESTRICTION VIOLATES THE FIFTEENTH AMENDMENT

The Fifteenth Amendment's command is clear and absolute, and allows for no exceptions or excuses: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race." U.S. Const. amend. XV, § 1.

Despite the plain terms of the Fifteenth Amendment and more than a century of this Court's jurisprudence, the State of Hawaii has imposed a stark race-based restriction on the right to vote in statewide elections for officials who distribute public funds. Indeed, Hawaii goes so far as to require potential voters to certify under penalty of perjury that they satisfy the State's racial blood test for OHA elections. *See* L. 2, 3; Haw. Rev. Stat § 19-3.5. This flagrant racial discrimination in the voting booth plainly violates the Fifteenth Amendment's guarantee of race-neutral voting laws and is patently offensive to two of the most important principles announced by our Constitution and by the decisions of this Court: that the fundamental right to participate fully and equally in elections for public officials may not be abridged by racial classifications, and that government-sponsored racial discrimination is inherently suspect and will not be tolerated.

The Ninth Circuit nevertheless held that Hawaii's facially race-based voting restriction is exempt from the express commands of the Fifteenth Amendment. In reaching that conclusion, the court relied on the "special purpose" election exception to the *Fourteenth* Amendment's one-person-one-vote rule this Court recognized in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973)—a case involving neither race-based voting restrictions nor the Fifteenth Amendment. The Ninth Circuit also held that the racial definitions of "Hawaiian" and "native Hawaiian" are mere "political" classifications. Neither of these propositions withstands analysis.

A. The Fifteenth Amendment Bans All Racial Restrictions On The Right To Vote

As the text of the Fifteenth Amendment makes clear, it prohibits *all* race-based restrictions on the right to vote for public officials. Thus, in *United States v. Reese*, 92 U.S. 214, 218 (1875), this Court declared that the Amendment grants all citizens a constitutional "exemption from discrimination in the exercise of the elective franchise on account of race." *See also United States v. Cruikshank*, 92 U.S. 542, 555-56 (1875) ("exemption from discrimination in the exercise of [the right to vote] on account of race" is "a necessary attribute of national citizenship"); *Terry v. Adams*, 345 U.S. 461, 467 (1953) ("The [Fifteenth] Amendment bans racial discrimination in voting by both state and nation.").

This Court has repeatedly reaffirmed the Fifteenth Amendment's simple and absolute ban on racially discriminatory election laws, even in the face of complex state mechanisms subtly crafted to avoid the Amendment's guarantee. In *Guinn v. United States*, 238 U.S. 347, 360-63 (1915), for example, the Court invalidated an Oklahoma statute that imposed a literacy requirement on voters but contained a "grandfather clause" applicable to individuals and their lineal descendants entitled to vote "on [or prior to] January 1, 1866," a date prior to

the passage of the Fifteenth Amendment. Despite the fact that the grandfather clause contained no express racial limitation, the Court readily concluded that the statute was an impermissible attempt to evade the Amendment's requirements. To dispute that the restriction was a race-based limitation on voting rights would be to "declare that the Fifteenth Amendment['s] ... provisions were wholly inoperative because susceptible of being rendered inapplicable by mere forms of expression embodying no exercise of judgment and resting upon no discernible reason other than the purpose to disregard the prohibitions of the Amendment." *Id.* at 363-64; *accord Myers v. Anderson*, 238 U.S. 368 (1915) (striking down Maryland's grandfather clause).

In *Smith v. Allwright*, 321 U.S. 649 (1944), the Court rejected another attempt to circumvent the requirements of the Fifteenth Amendment. In that case, the Court considered Texas's "white primary" system, which limited voting in primary elections to members of political parties whose membership requirements were set entirely by the "central committees" of each party. Recognizing this scheme as an attempt to achieve discriminatory ends by leaving the actual discrimination to "private" actors, the Court invalidated the primary system under the Fifteenth Amendment. Because "[t]he United States is a constitutional democracy," declared the Court, "[i]ts organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any state because of race." 321 U.S. at 664. The vital right to vote "is not to be nullified by a state through casting its electoral process in a form which permits a private organization to practice racial discrimination." *Id.*

Similarly, in *Gomillion v. Lightfoot*, 364 U.S. 339 (1960), this Court flatly rejected the State of Alabama's attempt to gerrymander its voting districts so as to create a racially "pure" voting block. The State had redrawn the boundaries of the City of Tuskegee into a "strangely

irregular" and "uncouth twenty-eight sided figure" that excluded nearly all black voters from the city's elections. *Id.* at 340, 341. Although the district redefinition was not written in expressly racial terms, the Court observed that "[t]he result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections." *Id.* at 341. Thus, Alabama's indirect attempt to exclude one race of voters from particular elections violated the Fifteenth Amendment, which "nullifies sophisticated as well as simple-minded modes of discrimination." *Id.* at 342 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

In contrast to the purportedly race-neutral grandfather clauses, white primaries, and gerrymanders invalidated in the foregoing cases, the OHA voting restriction is startlingly "simple-minded." Hawaii closes its election booth to anyone who fails its racial test.

Contrary to the court of appeals' conclusion, moreover, Hawaii's racial restriction cannot be defended on the ground that it merely limits the franchise to "those who are interested parties." Pet. App. 17a. That rationale would just as easily have excused the gerrymander struck down in *Gomillion*. The Court explained that that argument "would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of the realignment of political subdivisions. It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence." 364 U.S. at 345 (citation and internal quotation marks omitted). Hawaii's racially restrictive voting scheme, though more blatant, is analogous to the racial gerrymander at issue in *Gomillion*: Both constitute attempts to achieve a "racially pure" voting bloc justified on the ground that the right to vote has merely been limited to those "primarily affected" by the decisions of the elected officials.

The State asserts that as long as it can present itself as motivated by a sincere desire to protect or benefit the racial group in question, it is perfectly free to discriminate on the basis of race, even to the extent of sorting citizens according to the racial content of their "blood" and limiting the elections in which those citizens are permitted to vote on the basis of race. Opp. 1, 29 n.12. But the Fifteenth Amendment plainly prohibits such discriminatory electoral practices, and whether Hawaii restricts the franchise for the purpose of benefiting the preferred race or of injuring one or more of the excluded races is irrelevant. *Cf. Shaw v. Reno,* 509 U.S. 630, 642 (1993) ("No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute."); *South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966) (same). Hawaii's denial of the right to vote to all citizens other than racial "Hawaiians" is a clear violation of the Fifteenth Amendment.

B. The "Special Purpose Election" Exception Recognized In *Salyer* Does Not Apply To This Case

The Ninth Circuit held that Hawaii's racial voting restriction is exempt from the requirements of the Fifteenth Amendment on the basis of this Court's Fourteenth Amendment decision in *Salyer*, 410 U.S. 719. That conclusion is wrong.

In *Salyer*, this Court held that an election for a governmental body that serves a "special limited purpose" and whose decisions "disproportionate[ly] [a]ffect" a limited group of landowners may be confined to that group of landowners without violating the one-person-one-vote mandate of the *Fourteenth* Amendment. *Id.* at 728; *see also Ball v. James*, 451 U.S. 355 (1981). *Salyer* says nothing about the Fifteenth Amendment, and contains no suggestion that the "limited purpose" election doctrine has any application to race-based election laws.

The court of appeals held that OHA's mandate to deliver governmental services to racial "Hawaiians" satisfies the "special limited purpose" prong of *Salyer*, and that the effects of OHA's services are sufficiently focused on those individuals to satisfy the "disproportionate effect" prong. Pet. App. 12a-13a, 15a-16a. Thus, although the court below "recognize[d] that the [OHA] qualification has to do with race instead of ownership of land, as in *Salyer*," it nonetheless relied on *Salyer* in concluding that an OHA election "isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." *Id.* at 13a, 15a.

The court of appeals' analysis would create an infinitely elastic loophole in the Fifteenth Amendment's prohibition of racially discriminatory voting laws. So long as an official exercises something that can be characterized as "limited" governmental authority and serves only a racially identifiable subset of the population, the reasoning applied by Ninth Circuit would condone a wide variety of racial restrictions on the right to vote. Any reading of the Fifteenth Amendment that would render it so "susceptible of being rendered inapplicable by mere forms of expression" must be rejected. *Guinn*, 238 U.S. at 363-64.[5]

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[5] In this regard, the OHA voting restriction is similar to the "white primary" scheme struck down in *Smith*, 321 U.S. at 662-63. There, as here, the State attempted to shift important governmental functions to an institution that, under the State's theory, would be insulated from the Fifteenth Amendment's strict prohibition of race-based election laws. This Court's response in *Smith* is equally applicable here: The Fifteenth Amendment "is not to be nullified by a state through casting its electoral process in a form which permits . . . racial discrimination in the election. *Constitutional rights would be of little value if they could be thus indirectly denied.*" *Id.* at 664 (emphasis added).

As this Court repeatedly has held, moreover, the plain terms of the Fifteenth Amendment demonstrate that its prohibition against race-based election laws "*includes any election in which public issues are decided or public officials selected.*" *Terry*, 345 U.S. at 468 (emphasis added). Thus, in *Gray v. Sanders*, 372 U.S. 368 (1963), a case involving primary elections, the Court held that "[t]he concept of political equality in the voting booth contained in the Fifteenth Amendment *extends to all phases of state elections.*" *Id.* at 380 (emphasis added); *accord Smith*, 321 U.S. at 657 ("[T]he Fifteenth Amendment specifically interdicts *any denial* or abridgment by a state of the right of citizens to vote on account of color.") (emphasis added); *Guinn*, 238 U.S. at 362-63 (Fifteenth Amendment's restriction on race-based election laws "is coincident with the power [of States to govern voting] and prevents its exertion in disregard to the command of the Amendment").[6]

Prior to the rulings by the courts below, *no* court had held that the *Salyer* exception to the *Fourteenth*

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[6] This understanding of the Amendment's scope is also confirmed by judicial interpretations of Section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). In *Chisom v. Roemer*, 501 U.S. 380 (1991), this Court declared that Section 2 as originally enacted "was unquestionably coextensive with the coverage provided by the Fifteenth Amendment," and "protected the right to vote . . . *without making any distinctions or imposing any limitations as to which elections would fall within its purview.*" 501 U.S. at 392 (emphasis added); *accord City of Mobile v. Bolden*, 446 U.S. 55, 60-61 (1980) (Stewart, J.). The Court in *Chisom* quoted with approval the statement of Attorney General Katzenbach that "'[e]very election in which registered electors are permitted to vote would be covered' under § 2." 501 U.S. at 392. (quoting *H.R. 6400 and Other Proposals To Enforce the Fifteenth Amendment to the Constitution of the United States: Hearings Before Subcomm. No. 5 of the House Comm. on the Judiciary*, 89th Cong., 1st Sess. 21 (1965)).

Amendment's one-person-one-vote rule applied to the *Fifteenth* Amendment's ban on race-based election laws, or indeed to *any* race-based voting scheme. To the contrary, in *Quinn v. Millsap*, 491 U.S. 95, 106 (1989), this Court rejected a broad interpretation of the *Salyer* exception precisely because it "would render the Equal Protection Clause inapplicable even to a requirement that all members of the [limited government] board be white males." Such a result, and any reasoning leading to it, this Court concluded, would be "obviously untenable." *Id.* Yet that is precisely the type of "obviously untenable" requirement that Hawaii has imposed here.

In any event, even if *Salyer*'s narrow land-use exception were somehow deemed applicable to an explicit racial classification, OHA could not qualify as a "special limited purpose" governmental body. First, *Salyer* requires that the activities of the governmental body "disproportionately affect" the limited class of citizens granted the right to vote for its officials. This "disproportionate effect" prong requires, at a minimum, that the costs of those activities be borne disproportionately by those granted the right to vote. Thus, critical to the result in *Salyer* was the fact that "there is no way that the economic burdens of district operations can fall on residents *qua* residents" (410 U.S. at 729), and the Court distinguished and expressed disapproval of lopsided voting schemes in which "those persons excluded from voting . . . contributed both directly through local taxes and indirectly through increased rents." *Id.* at 727.

The *Salyer* exception, therefore, cannot be applied to OHA, a state agency that expends substantial funds drawn from taxes paid by *all* citizens of Hawaii without regard to race. *See, e.g.*, 1997 Haw. Sess. L., Act 240 (appropriating millions of dollars of general tax proceeds to OHA for fiscal years 1997-1999). Moreover, because OHA elections select state officials to manage and spend both legislative appropriations and public lands proceeds, it is axiomatic that all Hawaiian citizens, regardless of race, have a legitimate interest in the proper management of those funds. That is particularly true here, where the majority of OHA funds are subject to a "public trust." Admission Act, § 5(f). By definition, the entire "public" has an interest in how "public trust" proceeds are administered by state officials, regardless of who actually receives the expenditures.[7] In addition, *all* Hawaiian citizens are affected by how those funds are administered. Therefore, *all* voters in the State have a constitutional right to vote in any election that selects officials to administer those funds. *See Kramer v. Union Free School Dist. No. 15*, 395 U.S. 621, 626-33 (1969) (childless citizens who do not pay taxes are nevertheless interested in matters affecting public education, and cannot be denied the right to vote in school board elections).

In addition, OHA's broad mandate and extensive services make it a far cry from the simple water storage district this Court addressed in *Salyer*. The record shows that OHA is a "semi-autonomous" branch of state government that exercises sweeping discretion over large amounts of public funds and "can set the policies for the office separate from those established within the parameters of state government." J.A. 21-22. For this reason, OHA has proclaimed itself "an agency, a trust, and a government all rolled into one." *Id.* at 19.

Indeed, OHA's "broad purpose" encompasses a "lengthy" catalog of "programs and services," including student scholarships, business loans, housing assistance,

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[7] Ironically, the legislature of Hawaii itself recognized this fact in enacting the OHA laws: "[t]he requirement that the ultimate accountability for the [§ 5(f)] trust must be to *all the people of the State*—albeit that the beneficiaries of a portion of that trust res may consist of only one segment or category from among all of the varied peoples of Hawaii—is obvious by the language imposing the trust." Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 (emphasis added).

health programs, and cultural activities for racial "Hawaiians." J.A. 29. OHA incorporates, among other things, an education division that "help[s] establish an educational system which empowers Hawaiians" and "develop[s] model educational programs" for Hawaiian students; a health and human services division that "support[s] the development of and/or expansion of services that promote the health and well being of OHA beneficiaries"; and an economic development division that "increase[s] economic self-sufficiency within the Hawaiian community and . . . provide[s] better economic opportunities" to Hawaiians. L. 10 at 2-3. Nothing in *Salyer* or its progeny suggests that the exception created by that case applies to such an important and comprehensive organ of state government.

C. Hawaii's Voting Restriction Is Not A Political Classification

Despite acknowledging that Hawaii's election laws "contain a racial classification on their face" and are "clearly racial," the Ninth Circuit ultimately treated this race restriction as if it were a race-neutral political classification. Pet. App. 11a-16a. Similarly, respondent repeatedly characterizes the racial restriction on voting as merely a "political" classification aimed at promoting the goal of self-governance by granting a race-exclusive franchise to "those people (and their descendants) who were subjects of a formerly independent sovereign nation." Opp. 24. These political "sovereignty" arguments are flatly incompatible with the constitutional text and are historically inaccurate.

The State's definitions of "native Hawaiian" and "Hawaiian" contain racial classifications on their face. In the case of "native Hawaiian," the relevant statute defines this group *expressly* in racial terms: "descendant[s] of not less than one-half part of the *races* inhabiting the Hawaiian Islands previous to 1778." Haw. Rev. Stat. § 10-2 (emphasis added). The State's definition of "Hawaiian" substitutes the word "peoples"

for "races" (Haw. Rev. Stat. §§ 10-2, 13D-3), but the terms are equally race-based. In fact, the Hawaiian legislature made clear that the change was purely for aesthetic purposes and that the term "peoples" should be interpreted strictly on racial grounds. Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 ("The definitions of 'native Hawaiian' and 'Hawaiian' are changed to substitute 'peoples' for 'races.' *Your Committee wishes to stress that this change is non-substantive, and that 'peoples' does mean 'races.'*") (emphasis added).

In creating OHA and limiting the right to elect the OHA board to racial "Hawaiians," Hawaii's legislature specifically listed as one of its primary purposes "the protection and preservation of the Hawaiian *race*." Comm. of the Whole Rep. No. 13, in 1 Proceedings of the Constitutional Convention of Hawaii of 1978: Journal and Documents, at 1018 (1980) (emphasis added); *see also* J.A. 52. It further declared that the OHA laws constitute "imaginative affirmative action programs" designed to "better" the "long neglected" Hawaiian race and "to aid their establishment of ethnic identity." Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998; Stand. Comm. Rep. No. 784, in 1979 Sen. J., at 1351. Similarly, the records from the debates on the OHA legislation refer repeatedly to all non-"Hawaiian" races as "foreigners" and even "foreign invaders." J.A. 58-59.

As these legislative materials reveal with disturbing clarity, the classifications of "Hawaiian" and "native Hawaiian" are suffused with condescending and paternalistic racism. Whatever else may be said about preserving or promoting racial identities, it plainly is *not* a permissible subject of state action. *Cf. Loving v. Virginia*, 388 U.S. 1, 7 (1967) (rejecting Virginia's purported interests in "preserv[ing] the racial integrity of its citizens," preventing "a mongrel breed of citizens," and "the obliteration of racial pride") (citation omitted). That is particularly true where, as here, the mechanism

for achieving these offensive racial goals includes erecting racial barriers to the ballot box.[8]

That Hawaii's racial classifications make 1778 the only relevant date for determining class membership belies the State's claim that "sovereignty," as opposed to race, is their hallmark. Opp. 24. The government of the Kingdom of Hawaii did not lose its sovereign power until 1893, *a full 115 years after* the defining date for membership in the racial class. Indeed, the Kingdom of Hawaii *did not even exist* in 1778; the conquests of Kamehameha I did not result in a unified Kingdom of Hawaii until 1810. Thus, the year 1778 has no special relevance to claims of "native Hawaiian" sovereignty.

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[8] As was the case with Virginia's unconstitutional miscegenation laws—the centerpiece of which was entitled "An Act to Preserve Racial Integrity"—Hawaii's purported goal of "protect[ing]" and "preserv[ing]" racial identity is limited to only one race. *See Loving*, 388 U.S. at 11 & n.11 (fact that miscegenation laws punished only interracial marriages involving "white persons" demonstrated illegitimate purpose of preserving power of one race over others). In addition, as Virginia did with applicants for marriage certificates, Hawaii requires potential voters to attest to their racial identity and maintains records regarding the race of its citizens for use by state officials in administering the State's program of racial "preservation." *Compare id.* at 6-7 (Virginia officials maintained "certificates of 'racial composition'" and issued marriage certificates only after they were "satisfied that the applicants' statements as to their race are correct") (citation omitted), *with* L. 2, 3 (voter registration forms requiring attestation of "Hawaiian" racial identity), *and* L. 5 at 1 (*Native Hawaiian Data Book 1998*, Appendix) (State health survey "examines the ethnic background of the parents of each individual and bases its racial designation on the racial composition of his/her parents," rather than relying on self-identification method used by U.S. Census); *see also* L. 1 at 1, 2, 6, 9-27 ("Hawaiian Ancestry Enrollment Form" used by OHA to track individuals' "Percentage of Hawaiian Blood," maintain racial "registry," and enroll "card-carrying Hawaiian[s]" to receive "special group benefits").

In fact, the only possible relevance of 1778 is that it marks the last days of what might be characterized as the era of relative "racial purity" in the Hawaiian Islands. The Kingdom of Hawaii was itself established in no small part due to the aid given to Kamehameha by dozens of "westerners" whom Kamehameha rewarded by making them high-ranking chiefs and advisors in his government. Ralph S. Kuykendall, *The Hawaiian Kingdom 1778-1854: Foundation and Transformation* 25-29 (1938). Thus, in contrast to the State of Hawaii's race-based voting scheme, the Kingdom of Hawaii was not "racially pure" even at its inception.[9]

When the Kingdom of Hawaii ended in 1893—the only relevant date if "sovereignty" concerns were really driving the State's voting restriction—the inhabitants of the Hawaiian Islands who were descended from the pre-1778 inhabitants constituted less than half of the population. Schmitt, *supra*, at 74 (estimating 1890 population

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[9] Indeed, it was not "racially pure" even before 1778. As the Hawaii legislature's conference committee on the 1979 OHA laws stated,

> [T]here were cross-migrations of people between Hawaii and the South Pacific island groups previous to 1778, so that persons of those island groups may conceivably have a basis to claim having 'descended from races inhabiting the Hawaiian Islands previous to 1778.' In that connection, it is also conceivable that persons descended from any race which may have been shipwrecked on Hawaii before 1778 could similarly claim that distinction.

Stand. Comm. Rep. No. 784, in 1979 Sen. J., at 1353. In order to solve these "cross-migration" and "shipwrecked sailor" problems and ensure racial purity under OHA, the legislature revised the definition of "Hawaiian" by limiting it to "'descendants of the aboriginal races of people *which exercised sovereignty* and subsisted in the Hawaiian Islands in 1778 *and which races continued to reside there.*'" *Id.* at 1353-55 (emphasis added); Haw. Rev. Stat. § 10-2.

was 45.2 percent full- and partial-blooded "Hawaiian" and 54.9 percent "Non-Hawaiian" or "foreign"); *Hawaiian Annual 1897* at 11, 13 (Thos. G. Thrum ed., 1897) (listing the total population of the Hawaiian Islands in 1890 as 89,990, with full- and partial-blooded "Hawaiians" accounting for only 40,622); *see also* Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 YALE L.J. 537, 550 (1996). In this regard, the 1778 date is analogous to the grandfather clause struck down in *Guinn*. *See* 238 U.S. at 365 (finding no "peculiar necromancy in the time named which engendered attributes affecting the qualification to vote which would not exist at another and different period unless [avoiding] the Fifteenth Amendment was in view").

Moreover, with the notable exception of most Asian immigrants, many of the residents of the Kingdom of Hawaii who lacked what respondent calls "native blood" (Opp. 20) were full citizens of the Kingdom, and even more enjoyed substantial political rights (including the right to vote) as subjects and denizens. From the time of Kamehameha I and the establishment of the Kingdom of Hawaii, "foreigners," and in particular Americans and Europeans, held positions of considerable authority in the government (*see* Kuykendall, *supra*, at 25-29) and beginning in the 1840s a formal procedure was established by which they could, and did, become fully naturalized citizens of the Kingdom by taking an "oath of allegiance." *See, e.g.*, The First Laws of the Hawaiian Islands, ch. X (IX) (1842), *reprinted in The Fundamental Law of Hawaii* 48 (Lorrin A. Thurston ed., 1904). "A considerable number of . . . foreigners became naturalized." Kuykendall, *supra*, at 240, 230-38. And in 1887, the franchise was extended to "[e]very male resident of the Hawaiian Islands, of Hawaiian, American or

European birth or descent." Constitution of 1887, art. 59, *reprinted in Fundamental Law* at 189.[10]

Thus, the Kingdom of Hawaii was consciously multiracial. To the extent the OHA voting scheme promotes "sovereignty," therefore, it does so only for a *subset* of "those people (and their descendants) who were subjects of a formerly independent sovereign nation" (Opp. 24), *a subset defined exclusively along racial lines*. Indeed, as the record below reflects, *petitioner himself* is a descendant of subjects of the Kingdom of Hawaii. Pet. App. 6a, 20a. The fact that he nonetheless is excluded from voting belies any attempt to clothe Hawaii's racial gerrymander in the race-neutral garb of "sovereignty."

Finally, the patently racial nature of the voting restriction at issue here is further confirmed by respondent's arguments in this Court. Respondent's brief in opposition made no effort to challenge the Ninth Circuit's conclusion that the challenged voting restriction is facially racial. Moreover, respondent defends the OHA restriction on the repugnant racial ground that States can appropriately use one racial subgroup of citizens as a "prox[y]" for another, so long as they share some of the same racial "blood." Opp. 20, 25. And respondent boldly contends that race-based state action is justified to protect pure "native blood" from dilution. *Id.* 6, 20 & n.10. These undisguised rationalizations of discrimination on the basis of race foreclose any claim that the laws at issue here are race-neutral in purpose or effect.[11]

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[10] In a partial foreshadowing of current Hawaii law, the Constitution of 1887 disenfranchised all citizens of other racial backgrounds (most of whom were Asian), even those who were naturalized citizens of the Kingdom. Ralph S. Kuykendall, *The Hawaiian Kingdom 1874-1893: The Kalakaua Dynasty* 406-07 & n.* (1967).

[11] Respondent's attempts to justify the State's race-based voting laws are disturbingly reminiscent of the "Blood Protection"

II. HAWAII'S RACIAL VOTING SCHEME VIOLATES THE FOURTEENTH AMENDMENT

Hawaii's racial voting restriction also violates the Equal Protection Clause of the Fourteenth Amendment. That Clause requires strict judicial scrutiny of all state-sponsored racial classifications, and invalidates those that are not narrowly tailored to achieve a compelling state interest. *Hunt v. Cromartie*, No. 98-85, slip op. at 4 (U.S. May 17, 1999); *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 227 (1995); *City of Richmond v.*

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and "Citizenship" laws adopted as part of the infamous Nuremberg Laws. Just as OHA's voting restriction requires definitions of "native Hawaiian" and "Hawaiian" according to blood quantum and the race of one's ancestors, the Nuremberg laws restricted the right to vote of persons with "Jewish blood," and contained detailed definitions of "Jew" and "mixed Jewish blood." *See* 1 *The Holocaust: Legalizing the Holocaust, The Early Phase, 1933-1939* at 23, 24, 31-32 (John Mendelsohn & Donald S. Detwiler eds., 1982); *Fullilove v. Klutznick*, 448 U.S. 448, 534 n.5 (1980) (Stevens, J., dissenting) (quoting Nuremburg laws); *cf. Loving*, 388 U.S. at 5 n.4 (Virginia miscegenation laws defined "white persons" as persons who have "no trace whatever of any blood other than Caucasian," and "colored persons" as "[e]very person in whom there is ascertainable any Negro blood"); *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 633 n.1 (1990) (Kennedy, J., dissenting) ("Other examples are available. *See* Population Registration Act No. 30 of 1950, Statutes of the Republic of South Africa 71 (1985)."). These notions—that individuals should be judged by their "Hawaiian blood," "Jewish blood," "Negro blood," and the like—are the inevitable consequences of respondent's approach, and are entirely alien to our Constitution. "*Indeed, the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals.*" *Fullilove*, 448 U.S. at 534 n.5 (Stevens, J., dissenting) (emphasis added).

J. A. Croson Co., 488 U.S. 469, 496-97 (1989). Such classifications are "immediately" and "inherently" suspect (*Korematsu v. United States*, 323 U.S. 214, 216 (1944); *Miller v. Johnson*, 515 U.S. 900, 904 (1995) (citation omitted)), because "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). Where, as here, race discrimination is apparent on the face of the statute, "[n]o inquiry into legislative purpose is necessary." *Shaw v. Reno*, 509 U.S. 630, 642 (1993).

Despite an abundance of compelling precedents, the court of appeals found strict scrutiny inapplicable, and instead applied the deferential "rational basis" test on the erroneous assumptions that OHA's racially defined electorate can be treated as if it were a federally recognized Indian Tribe, and that elections for the powerful, taxpayer-funded OHA board can be treated like elections for tribal officials. The court also went on to hold in the alternative that Hawaii's race-based OHA election laws withstand strict scrutiny. But Hawaii's racial classification lacks a compelling justification and narrow tailoring, both of which are necessary to save this exercise in segregation at the ballot box from invalidation under the Fourteenth Amendment.

A. Hawaii's Racially Segregated Voting Scheme Is Not Narrowly Tailored To Achieve A Compelling State Interest

"[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. Such classifications must be invalidated unless the government meets its heavy burden of proving that "they are narrowly tailored measures that further compelling governmental interests." *Id.* at 224, 227; *Croson*, 488 U.S. at 493-94. Hawaii's racial election laws fail both elements of the strict scrutiny test.

"'A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification.'" *Shaw v. Reno*, 509 U.S. at 643-44 (citation omitted). "[W]henever the government treats any person unequally because of his or her race, that person has suffered an injury that falls squarely within the language and the spirit of the Constitution's guarantee of equal protection." *Adarand*, 515 U.S. at 229-30. Thus, a government may impose racial classifications only as a "last resort." *Croson*, 488 U.S. at 519 (Kennedy, J.). An interest is "compelling" only when it rests on a "strong basis in evidence" that government action favoring one race over another is both "necessary" and "legitimate." *Croson*, 488 U.S. at 493, 500; *Adarand*, 515 U.S. at 226, 228, 236. Similarly, a classification is "narrowly tailored" only when a government has no other choice—when it legitimately has attempted or considered alternative means and determined that they do not or cannot succeed (*Croson*, 488 U.S. at 507, citing *Fullilove*, 488 U.S. at 463-67; *id.* at 511 (Powell, J.))—and only when the chosen classification also minimizes any encroachment on the constitutional rights of other citizens (*Croson*, 488 U.S. at 510-11) and maintains "'the most exact connection between justification and classification.'" *Adarand*, 515 U.S. at 236 (quoting *Fullilove*, 488 U.S. at 537 (Stevens, J., dissenting)).

1. There is no compelling state interest that justifies Hawaii's race discrimination in elections for the OHA board. The *only* interest that this Court has found sufficiently compelling to justify race-based laws is the need to remedy present discrimination or the present effects of past discrimination. *Adarand*, 515 U.S. at 222; *Croson*, 488 U.S. at 493, 500; *see also Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting) ("[I]f there is no duty to measure the recovery by the wrong . . . our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate 'a piece of the action' for its members."). Nothing in the record demonstrates—nor has respondent even alleged—the existence of any past or present discrimination against racial "Hawaiians." Indeed, the only evidence of discrimination on this record is Hawaii's 21-year history of discrimination against Asian, white, black, Hispanic, and other citizens of Hawaii who lack the requisite "native blood." The absence of any evidence of discrimination against racial "Hawaiians" in which the State was a participant is sufficient in itself to show that Hawaii's racial voting scheme cannot survive strict scrutiny. *Croson*, 488 U.S. at 491-92, 505-06. Indeed, the notion that Hawaii could decide in 1978 to favor a class of individuals simply because they had some blood relationship, however slight, with inhabitants of the Islands two hundred years earlier, and at the same time disfavor every other Hawaiian citizen who lacks the preferred racial makeup, is wholly irreconcilable with this Court's Fourteenth Amendment cases.

The court of appeals identified two non-remedial interests that it viewed as sufficiently compelling to justify Hawaii's racial classification in voting: (1) the responsibility to honor the "trust" created by Section 5(f) of the Admission Act, and (2) the "perceived value" that a board "'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" Pet. App. 17a. Neither of these open-ended and generalized interests is sufficient to justify Hawaii's use of a racial classification under this Court's equal protection jurisprudence.

This Court has never held that a legislatively declared "trust" relationship suffices to justify racial discrimination in voting, and neither respondent nor the Ninth Circuit has identified any persuasive rationale for creating such a novel and potentially far-reaching exception to the dictates of the Equal Protection Clause. Particularly in this case, where the "trust" beneficiaries are themselves defined by race, *a fortiori* government

does not have a "compelling interest" in using race-based voting restrictions in order to extend a classification that is itself constitutionally suspect. *Cf. Croson*, 488 U.S. at 496 ("The desire to have more black medical students or doctors, standing alone, was not merely insufficiently compelling to justify a racial classification, it was 'discrimination for its own sake,' forbidden by the Constitution.") (O'Connor, J.) (citation omitted).

Nothing in the Admission Act or any other federal law provides a compelling basis for denying Hawaiian citizens the right to vote on account of race. To the contrary, the Admission Act does not even compel race-conscious administration of the ceded public lands. Instead, it spells out five possible uses for the public lands, without providing that *any* portion of those lands or the proceeds thereof must be set aside exclusively for the benefit of racial "Hawaiians." Admission Act, § 5(f) ("Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes . . . ."). Indeed, when these lands were annexed by the United States in 1898 they were committed to use for the benefit of all inhabitants of Hawaii, regardless of race, and from its admission to the Union in 1959 until 1978, the State administered these public lands proceeds in a race-neutral manner, allocating them principally to public education. *See* p. 2-5, *supra*. Respondent now takes the position that the State of Hawaii has a compelling interest in engaging in blatant racial discrimination today—and indefinitely into the future—in order to make up for even-handed treatment of all Hawaiian citizens, regardless of race, in the past. This is a bizarre and wrongheaded interpretation of the Equal Protection Clause.

Nor do the state laws creating OHA and purporting to define the "trust" create a compelling interest in race discrimination at the polls. Those laws mandate allocation and administration of general tax appropriations and 20 percent of public lands proceeds on the basis of race

(Haw. Const. art. XII, §§ 4-6; Haw. Rev. Stat. ch. 10), but they do not by their mere existence create an independent demand that must be "honor[ed]" (Pet. App. 17a) by racially discriminatory elections for the OHA board. *See Miller*, 515 U.S. at 921-23. Rather, each governmental racial classification requires its own compelling rationale. *Id.* at 922; *Shaw v. Hunt*, 517 U.S. 899, 911-12 (1996). The State therefore has no compelling need for a racially discriminatory voting regime to maintain its administration of the "trust," and it has offered no other constitutionally sufficient justification.

Moreover, in light of this Court's conclusion in *Anderson v. Martin*, 375 U.S. 399 (1964), that race is irrelevant to the election of government officials, Hawaii does not and cannot have a legitimate, let alone compelling, interest in turning citizens away from the polls on the basis of race. In *Anderson*, this Court rejected on equal protection grounds a State's claim that requiring political candidates to specify their race for use on the ballot was "reasonably designed to meet legitimate governmental interests in informing the electorate as to candidates." Hawaii's requirement that voters attest to the racial "composition" of their "blood" as a condition of voting in an election is an even deeper affront to the Fourteenth Amendment. To paraphrase *Anderson*, there is "no relevance in the State's pointing up the race of the [voter] as bearing upon his qualifications [as an elector]. Indeed, this factor in itself 'underscores the purely racial character and purpose' of the statute." 375 U.S. at 403 (citation omitted). That is because, as this Court declared so forcefully in the landmark poll-tax case *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966), *"race, creed or color[] is not germane to one's ability to participate intelligently in the electoral process."* (Emphasis added).

The second purported "compelling" interest identified below—the "perceived value that a board 'chosen from among those who are interested parties would be

the best way to insure proper management and adherence to the needed fiduciary principles'" (Pet. App. 17a)—is insufficient as well. The proposition that only members of a particular race are well situated to make government decisions affecting the expenditure of public funds on their behalf finds no support in this Court's jurisprudence and is irreconcilable with the basic premise of the Equal Protection Clause, which is that all citizens, *regardless* of race, have equal rights before the law and must be accorded an equal opportunity to participate in government decisionmaking. Indeed, the Ninth Circuit's recognition of this purportedly "compelling" interest effectively reinvigorates the patently offensive notion, previously rejected by this Court, that it is legitimate for States to categorize voters based on racial stereotypes. "It reinforces the perception that members of the same racial group . . . think alike, share the same political interests, and will prefer the same candidates at the polls. We have rejected such perceptions elsewhere as impermissible racial stereotypes." *Shaw v. Reno*, 509 U.S. at 647. And as this Court has emphasized, "[t]he community is harmed by the State's participation in the perpetuation of invidious group stereotypes." *J.E.B. v. Alabama*, 511 U.S. 127, 140 (1994).

Indeed, even if voters of other races would bring different points of view to OHA elections than those purportedly shared by racial "Hawaiians" (an assumption that is an invidious stereotype itself, without any support in the record), this Court has held that "'[d]ifferences of opinion' may not be the basis for excluding any group or person from the franchise." *Dunn v. Blumstein*, 405 U.S. 330, 355 (1972) (quoting *Cipriano v. City of Houma*, 395 U.S. 701, 705 (1969)). In short, any effort by Hawaii to construct an electorate "with a common interest in all matters pertaining to . . . government is impermissible" under the Equal Protection Clause. *Dunn*, 405 U.S. at 355 (punctuation omitted); *accord Carrington v. Rash*, 380 U.S. 89, 94 (1965) ("'Fencing out' from the

franchise a sector of the population because of the way they may vote is constitutionally impermissible.").

Equally importantly for purposes of this Court's equal protection analysis, such "generalized assertion[s]" of interests "provide[] no guidance for . . . determin[ing] the precise scope of the [purported] injury," and therefore provide "no logical stopping point" for an unfocused use of race in government decisions. *Croson*, 488 U.S. at 498 (citation and internal quotation marks omitted). Hawaii's racial voting restriction has been in effect now for 21 years, and nothing in the law, the lower court's opinion, or respondent's position before this Court suggests that this program of race discrimination is conceived as anything other than improperly "timeless in [its] ability to affect the future." *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 276 (1986) (Powell, J.). Hawaii's proffered justifications are therefore insufficient to support the State's racial classification.

2. OHA's racial voting law is not narrowly tailored to achieve the interests at which it is purportedly directed. The court of appeals' holding that Hawaii's race-based scheme "is precisely tailored to the perceived value that a board 'chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles'" (Pet. App. 17a) conflicts sharply with this Court's holding in *Croson* that racial classifications cannot be deemed to be narrowly tailored unless, at a minimum, the government has previously "carefully examined and rejected race-neutral alternatives" to attain the same end. *Croson*, 488 U.S. at 507. The court below did not identify "any consideration of the use of race-neutral means" by the State (488 U.S. at 507), nor did it make any effort to explain why such means would have been unavailing. Ensuring "proper management" and "adherence to . . . fiduciary principles" are goals that OHA shares with innumerable state agencies and other organizations whose leadership is selected by race-

neutral means, and virtually any trust of any sort, making the court's failure to examine these alternatives a particularly glaring departure from the approach mandated by this Court.

In fact, the State has several readily available race-neutral alternatives. For example, "[i]n matters of . . . breach of fiduciary duty, [OHA] board members shall be subject to suit" brought by any beneficiary of the public trust. Haw. Rev. Stat. § 10-16(c). The court below cited this law, but apparently failed to appreciate that it rendered unnecessary any recourse to supposed "racial solidarity" between OHA board members and racially defined "Hawaiians" as a guarantee of proper OHA administration. Most surprising is the lower court's failure to acknowledge that the courts, including the Ninth Circuit, have recognized alternative race-neutral means to ensure proper use of public lands proceeds. *See, e.g.*, *Price v. Akaka*, 928 F.2d 824, 826-28 (9th Cir. 1990) (recognizing 42 U.S.C. § 1983 claim against OHA); *Pele Defense Fund v. Paty*, 837 P.2d 1247, 1256-58 (Haw. 1992) (recognizing claims against OHA under Section 1983 and Hawaii's constitution).

Furthermore, the OHA voting scheme is not narrowly tailored because it does not even achieve the purportedly "compelling" goal identified by the court below: ensuring that "the beneficiaries [are] the same as the voters." Pet. App. 17a-18a. As it stands, the OHA election law is both overinclusive and underinclusive on its own terms.

The OHA scheme is overinclusive because the majority of OHA-qualified voters—racial "Hawaiians" who fail to satisfy the 50 percent blood quantum required to be "native"—are not in fact beneficiaries of the public lands proceeds, which are dedicated by state law exclusively to the benefit of the more racially pure "native Hawaiians," and which constitute the vast majority of OHA's funds. Haw. Rev. Stat. § 10-13.5. Thus, racial "Hawaiians"—the majority of OHA electors—are not among those whom the lower court classified as

"interested parties" worthy of the vote, at least with respect to the bulk of OHA's funds. Pet. App. 17a.[12] As in *Croson*, this racial classification is significantly overbroad in view of its stated goal, and it therefore fails the narrow tailoring requirement. *See* 488 U.S. at 506.

This overinclusiveness is reflected in the clashing interests, and overt conflicts, between the small group of 50 percent blood quantum "native Hawaiians" and the remaining "Hawaiians" who make up the majority of OHA's constituency. OHA has been sued repeatedly by "native Hawaiians" who claim that OHA improperly gives public-land revenues to other "Hawaiians" who dominate OHA elections.[13] Thus, far from being narrowly tailored to advance the interests of a class of beneficiaries defined in racial terms, Hawaii's race-based voting scheme undermines the economic interests of one racial subgroup of "beneficiaries" in favor of another, larger racial subgroup.

Hawaii's scheme is simultaneously *underinclusive*. By making race the primary factor defining the electorate for officials administering a "*public* trust" (Admis-

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[12] In the last five years for which audited figures are available, proceeds from the public lands (which benefit only 50-percent blood quantum "native Hawaiians") have exceeded OHA's legislative appropriations (which may be spent to benefit all racial "Hawaiians") by a ratio of more than seven to one. L. 8 at 54, 56; L. 9 at 10; L. 10 at 10, 11, 13 (OHA Financial Statements, 1993-1997).

[13] *See, e.g.*, *Price v. Akaka*, 928 F.2d 824 (9th Cir. 1990) (suit by native Hawaiians claiming OHA board members were spending public land proceeds for purposes other than the benefit of "native Hawaiians"); *Hoohuli v. Ariyoshi*, 631 F. Supp. 1153 (D. Haw. 1986) (upholding statutory definition of "Hawaiians" against claim by "native Hawaiians" that statute improperly expanded class of beneficiaries by distributing benefits without regard to blood quantum).

sion Act, § 5 (emphasis added)), the OHA laws silence all other members of the *public* with a legitimate interest in the administration of *public* lands proceeds, improperly distorting the electoral incentives for OHA board members.[14] There is no constitutional basis under the Fourteenth Amendment to invoke race to cut other members of the public off from their interest in the proper administration of the proceeds of the public lands.

The court of appeals notably did not hold that the OHA election scheme was narrowly tailored to Hawaii's other purportedly compelling interest, "honor[ing] the trust" (Pet. App. 17a), and instead merely remarked that the State's race-based voter restriction "responds to" that interest. *Id.* In any event, the "*public* trust" established in Section 5(f) of the Admission Act does not require the State to consider race at all in administering the public funds at issue here. Similarly, the state laws establishing OHA and setting aside 20 percent of the public lands proceeds for "native Hawaiians" do not depend on the voting restriction challenged here for their own effectiveness. *See* pp. 32-33, *supra*. And Hawaii's race-neutral distribution of the proceeds of the public lands from 1959 to 1978 shows that the State is capable of "honor[ing] the trust" without recourse to race discrimination.

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14 The OHA racial voting scheme excludes many Hawaiian citizens who are affected by the public money that flows through OHA. For example, all citizens benefited or burdened directly or indirectly by the educational resources channeled to racial "Hawaiians" are entitled to a role in selecting the elected government officials who control distribution of those resources (*Kramer*, 395 U.S. at 626-32), and more generally, all citizens who have an interest in seeing that their state tax dollars channeled through OHA are put to good use—*i.e.*, *all* citizens—are entitled to a voice in the selection of the elected officials who run those programs. *Kramer*, 395 U.S. at 632; *see also Salyer*, 410 U.S. at 729.

B. The "Special Relationship" Recognized In *Morton v. Mancari* Does Not Apply Here

The court of appeals relied on *Morton v. Mancari*, 417 U.S. 535 (1974), to rationalize its decision to ignore the required strict scrutiny standard. But *Mancari* compels precisely the opposite conclusion.

1. In *Mancari*, this Court held that a "special relationship" exists between the United States and federally recognized Indian Tribes by virtue of the Indian Commerce and Treaty Clauses of the Constitution. 417 U.S. at 551-52. Accordingly, the Court concluded that a hiring preference for tribal members employed by the Bureau of Indian Affairs (BIA) was a political rather than a racial preference and was subject only to rational basis review (*id.* at 553-54 & n.24), rather than the strict scrutiny normally applied to race-based laws. Significantly, however, that holding was expressly predicated on the fact that the challenged preference involved a *tribal*, rather than a *racial*, classification (*id.*)—a factor that respondent concedes cannot be satisfied here. Opp. 18.[15]

Racial "Hawaiians" are not a federally recognized Indian Tribe, and therefore do not fall within the reach of *Mancari*. Because this Court traces authority for the "special relationship" to the Indian Commerce and Treaty Clauses of the Constitution—which are limited

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15 Strict scrutiny applies with equal rigor to *all* distinctions based on race, including those that single out "Indians" based on race. For example, in *Adarand* this Court refused to enforce a federal program benefiting "'Black Americans, Hispanic Americans, *Native Americans*, Asian Pacific Americans, and other minorities'" in the absence of a governmental showing of a compelling interest in discrimination and a narrowly tailored solution. 515 U.S. at 205 (emphasis added; citation omitted). Similarly, in *Croson* the Court invalidated a municipal program benefiting "'Blacks, Spanish-speaking, Orientals, *Indians*, Eskimos, or Aleuts'" for the same reason. 488 U.S. at 478 (emphasis added; citation omitted).

by their own terms to "Indian Tribes" and separate sovereign entities capable of entering into "Treaties" with the United States (U.S. Const. art. I, § 8, art. II, § 2)—"only . . . members of 'federally recognized' tribes" enjoy a "special relationship" with the federal government, while "'racial' group[s] consisting of 'Indians'" do not. *Mancari*, 417 U.S. at 553 n.24; *id.* at 551-52; *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973). As the court below candidly acknowledged, "Hawaiians" "aren't organized in tribes and there isn't an Hawaiian Commerce Clause in the Constitution." Pet. App. 14a; *see also Price v. Hawaii*, 764 F.2d 623, 626-28 (9th Cir. 1985) (racial "Hawaiians" are not a federally recognized Indian Tribe). Indeed, respondent has conceded that "[t]he tribal concept simply has no place in the context of Hawaiian history." Opp. 18; *see also id.* ("*all* Hawaiians and native Hawaiians, without regard to any tribal classification" are beneficiaries of Hawaii's race-based regime, including the exclusive right to vote in elections for the OHA board) (emphasis in original). This conceded lack of tribal status precludes any attempt to fit Hawaii's "Hawaiian blood" racial classifications within *Mancari*.

Subsequent cases confirm that the existence of a formally recognized tribal government—"possessing 'the power of regulating their internal and social relations'"—is the defining characteristic of this "special relationship." *United States v. Mazurie*, 419 U.S. 544, 557 (1975) (citations omitted); *see also Fisher v. District Court*, 424 U.S. 382, 390-91 (1976); *United States v. Antelope*, 430 U.S. 641, 645-46 (1977); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979). Notably, neither respondent nor the Ninth Circuit has identified any governing body that regulates the "internal and social relations" of racial "Hawaiians." Indeed, given that racial "Hawaiians" lack any tribal government, references to "internal relations" in this context are nonsensical.[16]

Thus, as legal opinions of the Executive Branch have long recognized, "if the special treatment of Indians cannot be grounded in their unique status as political entities . . . , to treat Indians other than as ordinary citizens would constitute impermissible discrimination." 6 Op. Off. Legal Counsel 298, 308 (1982). After this Court's decision in *Adarand*, for example, the Office of Legal Counsel advised the President that the federal government's "special relationship" with Indians remained limited to "Native Americans *as members of federally recognized Indian tribes*." 19 Op. Off. Legal Counsel, 1995 WL 835775 (June 28, 1995) (emphases added); *id.* (in *Mancari*, the "Court reasoned that a *tribal classification* is 'political rather than racial in nature,' because it is "granted to Indians not as a discrete racial

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16 The court of appeals' reliance on Hawaii's role in creating a "special relationship" between racial "Hawaiians" and the State is precluded by *Yakima Nation*, which held that the *Mancari* "special relationship" does not apply to the States. 439 U.S. at 500-01 ("'[T]he unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians . . . . *States do not enjoy this same unique relationship with Indians.*") (quoting *Mancari*, 417 U.S. at 551-52) (emphasis added). Because Congress has not granted Hawaii "explicit authority" to act on its behalf in this arena (*see* 439 U.S. at 501), the State cannot rely on the constitutional basis of federal-tribal relations to justify its race discrimination at the polls. In any event, "Congress has no affirmative power to authorize the States to violate the Fourteenth Amendment and is implicitly prohibited from passing legislation that purports to validate any such violation" (*Saenz v. Roe*, No. 98-97, slip op. at 18 (U.S. May 17, 1999)), and therefore any purported grant of authority to Hawaii to prefer racial "Hawaiians" could not validate Hawaii's discrimination in OHA elections.

group, but, rather, as members of quasi-sovereign tribal entities") (emphasis added).

In contrast, Hawaii's definition of "Hawaiians" is entirely racial, and encompasses every resident with even a drop of "Hawaiian blood," without any requirement of tribal membership. Hawaii's election laws thus limit the right to vote based on the race of the voters, not their political identity, and accordingly those laws cannot be reconciled with *Mancari* and its progeny.[17]

That racial "Hawaiians" are not a federally recognized Indian Tribe is further confirmed by the federal government's treatment of Hawaiian citizens. For example, both Alaska and Hawaii became United States possessions in the second half of the nineteenth century and States in 1959. The 1867 treaty by which Russia ceded Alaska to the United States expressly provided that all inhabitants of the Alaskan territory would be granted U.S. citizenship, "*with the exception of uncivilized native tribes*." Treaty with Russia art. III, 15 Stat. 539 (1867) (emphasis added). That treaty further provided that "[t]he uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country." *Id.* Like other tribal Indians, Alaskan Natives were not granted U.S. citizenship until 1924. *See* Act of June 2, 1924, Pub. L. No. 175, ch. 233, 43 Stat. 253.

In contrast, the Organic Act of 1900, which made Hawaii a formal Territory, granted full and immediate United States citizenship to "all persons who were citi-

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17 Indeed, if *Mancari* could be read in the manner adopted by the court below, it would be irreconcilable with this Court's equal protection jurisprudence, particularly *Adarand*, 515 U.S. 200, and would have to be overruled. *See Williams v. Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997) (questioning whether *Mancari* survives *Adarand*), *cert. denied sub nom. Kawerak Reindeer Herders Ass'n v. Williams*, 118 S. Ct. 1795 (1998).

zens of the Republic of Hawaii" in 1898, including racial "Hawaiians." 31 Stat. 141, § 4. Racial "Hawaiians," in fact, not only enjoyed citizenship and the right to vote, but were the dominant political group in Hawaii for several decades after annexation, and were well represented in all forms of public office. *See, e.g.*, Lawrence H. Fuchs, *Hawaii Pono: A Social History* 161 (1961) (racial "Hawaiians" enjoyed "a clear majority of voters through the 1922 election, and more than any other group until 1938"); Andrew W. Lind, *Hawaii's People* 93 (1955).[18]

In sum, racial "Hawaiians" came into the federal union *as citizens*, not as members of a separate, quasi-sovereign Indian Tribe. Not surprisingly, neither "Hawaiians" nor "native Hawaiians" have ever been recognized as an Indian Tribe, and respondent disdains that very notion. Opp. 18.

The only way respondent can defend Hawaii's racial voting restriction is by entirely divorcing *Mancari*'s "special relationship" from its constitutional underpinnings. Respondent contends that it "is simply wrong to suggest that *Morton* turned on the unique Indian Commerce and Treaty Clauses of the Constitution," and that "[a]ny careful reading of *Morton* makes clear that the key to *Morton* was the historical special relationship and the self-governance factors, which apply equally well to Hawaiian history and the voter restriction." Opp. 18-19 (citation omitted).

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18 Indeed, it was in large part the declining political power of racial "Hawaiians" compared with other groups, primarily Asians, that led to the enactment of the HHCA. *See* H.R. Rep. No. 66-839, at 2 (1920) (quoting voter registration statistics and lamenting that racial "Hawaiians" were "fast becoming a minority element among the races of the Islands, with the probable result that in the future political control will pass into other hands. According to the latest estimates not only the Japanese and Portuguese, but also the Chinese, now outnumber the full-blooded Hawaiians.").

Respondent thus would read out of the Indian Commerce and Treaty Clauses, as well as this Court's settled jurisprudence, any requirement of tribal status. In its place, he would impose an amorphous and free-ranging "historical relationship" or "former sovereign" clause. There are no such clauses in the Constitution, and respondent's argument implicitly concedes that nothing in the Constitution *as actually written*, and in particular neither the Indian Commerce Clause nor the Treaty Clause, authorizes Hawaii's racial classification based on "Hawaiian blood." Such a counter-textual interpretation of the "special relationship" would wreak havoc on this Court's established jurisprudence under the Fourteenth and Fifteenth Amendments. And it would permit similar special treatment for descendants of "native" Texans, Californians, or other groups who could claim to trace their ancestors to some past "sovereign."

2. Finally, even if *Mancari* had some application to state laws granting preferences to racial "Hawaiians," it would not support respondent's argument. Neither *Mancari* nor any other decision relying on the "special relationship" between the national government and federally recognized Indian Tribes involved the fundamental right to vote in *statewide elections* for *state* officials. That distinction is important, for as this Court explained in *Reynolds v. Sims*, 377 U.S. 533 (1964), "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights," and therefore "*any* alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562 (emphasis added); *see also Kramer*, 395 U.S. at 627. Unlike the hiring preference at issue in *Mancari*, "statutes distributing the franchise constitute the foundation of our representative society," and for that reason, "[*a*]*ny* unjustified discrimination in determining who may participate in political affairs or in the selection of public officials undermines the legitimacy of representative government." *Id.* at 626 (emphasis added). Thus, *Mancari* cannot shield Hawaii's racially

discriminatory voting laws from strict judicial scrutiny—a scrutiny that, as shown above, is fatal to this naked racial classification.

III. HAWAII'S RACE-BASED VOTING LAWS ARE NOT IMMUNIZED FROM CHALLENGE BY THE MERE EXISTENCE OF OTHER RACIALLY DISCRIMINATORY LAWS

The Ninth Circuit concluded that because this case challenges only Hawaii's racial voting restriction, the State's other race-based laws must conclusively be presumed to be constitutional. "[W]e *must* accept the [race-based] trusts and their administrative structure as we find them, and assume that both are lawful." Pet. App. 9a (emphasis added). The court then reasoned that if the racial classifications in the underlying laws are presumed lawful, the OHA election laws containing the same classifications "must" also be constitutional. *Id.* at 9a-10a. Such tortured logic cannot shield Hawaii's blatantly racial voting laws from meaningful judicial review. The presumption adopted below is both irrelevant to the issues presented in this case and flatly inconsistent with this Court's Fourteenth and Fifteenth Amendment jurisprudence.

The Ninth Circuit's absolute presumption of constitutionality for unchallenged laws has no bearing on the constitutionality of the OHA voting restriction. The Fifteenth Amendment, which brooks no exceptions to its ban on race discrimination at the ballot box (*see* Part I.A), prohibits Hawaii's race-based voting laws, whether or not Hawaii's other racial classifications are constitutional. Nor can Hawaii's purported interests in excluding some races from OHA elections survive Fourteenth Amendment strict scrutiny, even if the laws creating the "racial classification that underlies the trusts and OHA" (Pet. App. 9a) are assumed to be constitutional. *See* Part II.A. Neither the "trust" nor the goal of "bettering" the conditions of native Hawaiians justifies race discrimina-

tion against all other citizens of Hawaii in OHA elections. In fact, this Court has rejected the use of such racial stereotypes as akin to "political apartheid" (*Shaw v. Reno*, 509 U.S. at 647), as well as government efforts to control electoral outcomes by limiting citizen participation. *Dunn*, 405 U.S. at 355. Thus, even if it were lawful, the absolute presumption adopted below would be irrelevant to this case.

The Ninth Circuit's approach also is irreconcilable with this Court's case law, which makes clear that race-based laws are "presumptively unconstitutional" (*Bush v. Vera*, 517 U.S. 952, 976 (1996); *Shaw v. Reno*, 509 U.S. at 642-43), and that "the general presumption of constitutionality afforded state statutes . . . [is] not applicable" to "statutes which deny some residents the right to vote." *Kramer*, 395 U.S. at 627-28. Unless this Court is willing to abandon its justifiable skepticism of racial classifications and abridgments of the right to vote, the Ninth Circuit's presumption of constitutionality cannot be allowed to justify Hawaii's racially restrictive voting laws.

Even where a particular form of racial classification is *permitted* by the Constitution (*e.g.*, in the case of purely private discrimination, *Georgia v. McCollum*, 505 U.S. 42, 50 (1992)), this Court has held that States may not rely on that constitutionally permissible discrimination to engage in further state-sponsored race-conscious action. Thus, in *Pennsylvania v. Board of Dirs. of City Trusts*, 353 U.S. 230 (1957), this Court held that a state agency violated the Fourteenth Amendment when it enforced the racially discriminatory terms of a private will. *Id.* at 231. Similarly, in *Evans v. Newton*, 382 U.S. 296, 301-02 (1966), the Court prohibited the city of Macon, Georgia, from honoring a racially discriminatory provision of a will that established a "whites only" public park. The Fourteenth Amendment, the Court declared, "bars a city from acting as a trustee under a private will that serves the racial segregation cause." *Id.* at 298.

A fortiori, States may not rely on their own racial classifications to justify other, plainly impermissible race-conscious laws.

In fact, this Court recently rejected a State's attempt to defend its race-based action by claiming it was necessitated by a prior governmental racial classification. *Miller v. Johnson*, 515 U.S. at 921-23. In *Miller*, Georgia defended its race-conscious redistricting plan on the ground that the U.S. Department of Justice had mandated that the State create as many majority-minority congressional districts as possible. 515 U.S. at 906-07, 921. The Court rejected that defense: "We do not accept the contention that the State has a compelling interest in complying with whatever preclearance mandates the Justice Department issues." *Id.* at 922. Rather, the Court explained, "[w]hen a state governmental entity seeks to justify race-based remedies to cure the effects of past discrimination, we do not accept the government's mere assertion that the remedial action is required. . . . [W]e insist on a strong basis in evidence of the harm being remedied." *Id.* Nor was the Court willing to forego its "presumptive skepticism of all racial classifications" when weighing the underlying Justice Department rulings on which Georgia relied for its defense. *Id.* Rather, the Court held, "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.*[19]

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[19] The *Adarand* case followed a similar course. Plaintiff Adarand Constructors challenged only the program that affected it, rather than the entire regime containing the constitutionally suspect terms that this Court eventually reviewed. On appeal, the government argued that Adarand lacked standing to challenge the constitutionality of the regime because it "had not charged in its complaint that section 502 was unconstitutional." *Adarand Constructors, Inc. v. Peña*, 16 F.3d 1537, 1543 (10th Cir. 1994). The court

Miller is illustrative of this Court's long-standing insistence that racial classifications must be presumed to be unconstitutional unless and until the State meets its constitutional burden of demonstrating affirmatively that each such classification is narrowly tailored to achieve a compelling government interest. In this case, the State chose to place at issue its creation of the OHA "trusts," asserting that the existence of those racial set-asides provides a compelling justification for the racial voting restriction challenged by petitioner. Before such a defense could be given any weight, however, the State was obligated to demonstrate that the presumptively unconstitutional racial classifications on which it predicates its defense (*i.e.*, the laws creating the alleged "trust" relationship) were themselves constitutionally permissible.

The Ninth Circuit improperly failed to require any such showing. Instead, the court uncritically accepted as conclusively valid and legitimate the State's proffered race-based justifications, announcing that the State had a compelling interest in enacting its race-based voting restriction simply because the restriction extended the racial classifications embodied in the state statutes creating and funding OHA. Pet. App. 9a, 17a-18a. There could be no sharper, or more improper, rejection of *Miller* and a host of other equal protection decisions of this Court. The Ninth Circuit's holding that a State's proffered justification for race-conscious action must be

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of appeals rejected the government's argument, explaining that it was "satisfied that Adarand is entitled to attack the constitutional validity of the legislation authorizing the very program which was challenged in its complaint." *Id.* The government abandoned that argument in this Court, which proceeded to the merits, thereby implicitly approving the lower court's judgment on the standing issue. *See, e.g., Bender v. Williamsport Area Sch. Dist.*, 475 U.S. 534, 541 (1986).

conclusively presumed to be valid and legitimate, even if it is itself based on a presumptively unconstitutional racial classification, is clearly wrong.[20] As this Court explained in *Miller*, the courts may not simply abandon the difficult judicial function of constitutional review: "to insulate racial districting from constitutional review . . . would be surrendering . . . our role in enforcing the constitutional limits on race-based official action. We may not do so." 515 U.S. at 922.

There is no law or policy permitting courts to transform judicial review from the required assessment of the constitutionality of laws into a game, where legislatures are rewarded for violating citizens' rights when they do so in multifarious ways. The mere fact that petitioner did not independently challenge each and every one of Hawaii's racially discriminatory laws does not render any of those laws presumptively constitutional, nor does it provide the State with an automatic exemption from strict scrutiny when it chooses to put those laws at issue by proffering them as an affirmative defense in support of another racially discriminatory law. The Ninth Circuit's contrary reasoning would compel courts to uphold an unconstitutional racial classification whenever a related but antecedent racial classification was unchallenged, in direct violation of this Court's consistent refusal to extend any presumption of constitutionality to race-based government action. The Ninth Circuit's reasoning amounts to an evasion of its constitutional responsibility, and must be rejected.

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[20] The malleability and impropriety of such willful judicial blindness is revealed by the court of appeals' one-sided application of its unorthodox presumption After insisting that it was compelled to ignore the relationship between the underlying laws and the Constitution (Pet. App. 9a), the court proceeded to dedicate the bulk of its opinion to, and base its judgment for respondent on, a detailed analysis of the relationship between those same underlying laws and the OHA racial election restrictions. *Id.* at 10a-18a.

CONCLUSION

The Ninth Circuit's approaches to voting rights and equal protection invite all manner of laws that would increase the racial balkanization of America. Hawaii's racial voting scheme is inconsistent with more than a century of painful lessons taught by the Civil War and by this Court's carefully wrought interpretation of the constitutional amendments that followed it. If our Nation's struggles with race discrimination have taught one lesson, it is that when we distort our Constitution in the service of one race we do the gravest injustice to our Nation, and to the people. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

CONSTITUTION OF THE UNITED STATES

AMENDMENT XIV

Section 1. . . . No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

* * * * *

AMENDMENT XV

Section 1. The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude.

CONSTITUTION OF THE STATE OF HAWAII

ARTICLE XII: HAWAIIAN AFFAIRS

* * * * *

PUBLIC TRUST

Section 4. The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians and the general public.

OFFICE OF HAWAIIAN AFFAIRS; ESTABLISHMENT OF BOARD OF TRUSTEES

Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held

in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians. There shall be not less than nine members of the board of trustees; provided that each of the following Islands have one representative: Oahu, Kauai, Maui, Molokai and Hawaii. The board shall select a chairperson from its members.

POWERS OF BOARD OF TRUSTEES

Section 6. The board of trustees of the Office of Hawaiian Affairs shall exercise power as provided by law: to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals and income derived from whatever sources for native Hawaiians and Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in section 4 of this article for native Hawaiians; to formulate policy relating to affairs of native Hawaiians and Hawaiians; and to exercise control over real and personal property set aside by state, federal or private sources and transferred to the board for native Hawaiians and Hawaiians. The board shall have the power to exercise control over the Office of Hawaiian Affairs through its executive officer, the administrator of the Office of Hawaiian Affairs, who shall be appointed by the board.

Pub. L. 86-3, 73 Stat. 4

HAWAII ADMISSION ACT

* * * * *

SEC. 5. ... (b) Except as provided in subsection (c) and (d) of this section, the United States grants to the State of Hawaii, effective upon its admission into the Union, the United States' title to all the public lands and other public property, within the boundaries of the State

of Hawaii, title to which is held by the United States immediately prior to its admission into the Union. The grant hereby made shall be in lieu of any and all grants provided for new States by provisions of law other than this Act, and such grants shall not extend to the State of Hawaii.

* * * * *

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provisions of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university.

HAWAII REVISED STATUTES

CHAPTER 10: OFFICE OF HAWAIIAN AFFAIRS

[§10-1]. Declaration of purpose.

(a) The people of the State of Hawaii and the United States of America as set forth and approved in the Admission Act, established a public trust which includes among other responsibilities, betterment of conditions for native Hawaiians. The people of the State of Hawaii reaffirmed their solemn trust obligation and responsibility to native Hawaiians and furthermore declared in the state constitution that there be an office of Hawaiian affairs to address the needs of the aboriginal class of people of Hawaii.

(b) It shall be the duty and responsibility of all state departments and instrumentalities of state government providing services and programs which affect native Hawaiians and Hawaiians to actively work toward the goals of this chapter and to cooperate with and assist wherever possible the office of Hawaiian affairs.

* * * * *

§10-2. Definitions. In this chapter, if not inconsistent with the context:

* * * * *

"Hawaiian" means any descendant of the aboriginal people inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii.

"Native Hawaiian" means any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaiian Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum of such aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands

in 1778 and which peoples thereafter continued to reside in Hawaii.

* * * * *

§10-3 Purpose of the office. The purposes of the office of Hawaiian affairs include:

(1) The betterment of conditions of native Hawaiians;

(2) The betterment of conditions of Hawaiians;

(3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians; except that the Hawaiian Homes Commission Act, 1920, as amended, shall be administered by the Hawaiian homes commission;

(4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;

(5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and

(6) Serving as a receptacle for reparations.

* * * * *

§10-4. Office of Hawaiian affairs; established; general powers. There shall be an office of Hawaiian affairs constituted as a body corporate which shall be a separate entity independent of the executive branch. The office, under the direction of the board of trustees, shall have the following general powers:

(1) To adopt, amend, and repeal bylaws governing the conduct of its business and the performance of the powers and duties granted to or imposed upon it by law;

(2) To acquire in any lawful manner any property, real, personal, or mixed, tangible or intangible, or any interest therein; to hold, maintain, use, and operate the

same; and to sell, lease, or otherwise dispose of the same at such time, in such manner and to the extent necessary or appropriate to carry out its purpose;

(3) To determine the character of and the necessity for its obligations and expenditures, and the manner in which they shall be incurred, allowed, and paid, subject to provisions of law specifically applicable to the office of Hawaiian affairs;

(4) To enter into and perform such contracts, leases, cooperative agreements, or other transactions with any agency or instrumentality of the United States, or with the State, or with any political subdivision thereof, or with any person, firm, association, or corporation, as may be necessary in the conduct of its business and on such terms as it may deem appropriate;

(5) To execute, in accordance with its bylaws, all instruments necessary or appropriate in the exercise of any of its powers;

* * * * *

(9) To take such actions as may be necessary or appropriate to carry out the powers conferred upon it by law.

* * * * *

[§10-6]. General duties of the board.

(a) The general duties of the board shall be:

(1) To develop, implement, and continually update a comprehensive master plan for native Hawaiians and Hawaiians which shall include, but not be limited to, the following:

(A) Compilation of basic demographic data on native Hawaiians and Hawaiians;

(B) Identification of the physical, sociological, psychological, and economic needs of native Hawaiians and Hawaiians;

(C) Establishment of immediate and long-range goals pursuant to programs and services for native Hawaiians and Hawaiians;

(D) Establishment of priorities for program implementation and of alternatives for program implementation; and

(E) Organization of administrative and program structure, including the use of facilities and personnel;

(2) To assist in the development of state and county agency plans for native Hawaiian and Hawaiian programs and services;

(3) To maintain an inventory of federal, state, county, and private programs and services for Hawaiians and native Hawaiians and act as a clearinghouse and referral agency;

(4) To advise and inform federal, state, and county officials about native Hawaiian and Hawaiian programs, and coordinate federal, state, and county activities relating to native Hawaiians and Hawaiians;

(5) To conduct, encourage, and maintain research relating to native Hawaiians and Hawaiians;

(6) To develop and review models for comprehensive native Hawaiian and Hawaiian programs;

(7) To act as a clearinghouse for applications for federal or state assistance to carry out native Hawaiian or Hawaiian programs or projects;

(8) To apply for, accept and administer any federal funds made available or allotted under any federal act for native Hawaiians or Hawaiians; and

(9) To promote and assist the establishment of agencies to serve native Hawaiians and Hawaiians.

(b) The board shall have any powers which may be necessary for the full and effective performance and discharge of the duties imposed by this chapter, and which

may be necessary to fully and completely effectuate the purposes of this chapter.

* * * * *

§10-13.5. Use of public land trust proceeds.

Twenty per cent of all revenue derived from the public land trust shall be expended by the office for the betterment of the conditions of native Hawaiians.

* * * * *

CHAPTER 13D: BOARD OF TRUSTEES, OFFICE OF HAWAIIAN AFFAIRS

* * * * *

§13D-3. Qualifications of voters; registration.

(a) Every person who registers as required by law shall be entitled to vote at any election of board members provided that the person shall have attained the age of eighteen years at the time of the election.

(b) No person shall be eligible to register as a voter for the election of board members unless the person meets the following qualifications:

(1) The person is Hawaiian;

(2) The person has attained the age of eighteen years or will have attained such age within one year of the date of the next election of board members; and

(3) The person is otherwise qualified to register to vote in the State.

Supreme Court, U.S.
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No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that allowing only the beneficiaries of trust obligations to select the trustees bound to meet those obligations does not violate the Fourteenth or Fifteenth Amendment, when the validity of the underlying trust obligations is unchallenged and the obligations are based on the congressionally recognized status of the beneficiaries as an indigenous people, who—like American Indians and Alaska Natives—were once sovereign, have unique ties to aboriginal lands taken by the Federal Government, and occupy a long-standing special trust relationship with the United States?

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IN THE

Supreme Court of the United States

No. 98-818

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

BRIEF FOR RESPONDENT

INTRODUCTION

Because petitioner and his amici have taken such liberties with it, we begin by restating the only classification challenged in this case: Hawaii limits eligibility to select trustees of the trusts established for the benefit of the indigenous people of Hawaii to the sole beneficiaries of those trusts—"Hawaiians." Haw. Rev. Stat. § 13D-3(b)(1). The term "Hawaiian" is not defined in "blatant," "flagrant," or "explicit" racial terms, as petitioner's mantra has it. Br. 1, 13, 32. It means "any descendant of the aboriginal people inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10-2. "Blood"—which practically seeps from petitioner's brief—is not found anywhere in this definition. Nor is "race." The definition instead is perfectly drawn to capture the intended class: indigenous Hawaiians, the once-sovereign people who—as Congress has repeatedly recognized—enjoy unique ties to aboriginal lands and a special trust relationship with the United States.[1]

[1] We use "indigenous Hawaiian" interchangeably with "Hawaiian." We use "Native Hawaiian" to refer to the definition estab-

From our Nation's founding, Congress and this Court have recognized a special obligation to America's first inhabitants and their descendants—over whose aboriginal homelands we have extended our national domain—and have recognized that Congress is empowered to honor that obligation as it sees fit. Centuries of Indian jurisprudence rest on this understanding in the case of the indigenous people of the lower 48 States—American Indians. Congress has recognized that this obligation extends as well to Alaska Natives, even though they are historically and culturally distinct from American Indians, and until recently were not formally recognized as "Indian tribes." And Congress has recognized this obligation in the case of indigenous Hawaiians, who—like Alaska Natives—are historically and anthropologically distinct from American Indians. Indeed, Congress has expressly "affirm[ed] the trust relationship between the United States and Native Hawaiians"—the "indigenous people with a historical continuity to the original inhabitants of [Hawaii] whose society was organized as a Nation prior to * * * 1778." 42 U.S.C. § 11701(1), (13).

Contrary to petitioner's suggestion, this case does not present an opportunity to end racial strife in this country. Nor does it fit in line with the Court's precedents confronting discrimination against African-Americans, or efforts to redress that discrimination. Rather, in its broadest terms, the case presents the question whether Congress and the State of Hawaii—acting pursuant to and consistent with the federal trust responsibility Congress required the State to accept before admitting it to the Union—may honor the special obligation to indigenous Hawaiians, in the same fashion Congress and many States

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lished by the Hawaiian Homes Commission Act ("HHCA"), § 201(a)(7), 42 Stat. 108 (1921), and incorporated in Haw. Rev. Stat. § 10-2. As we explain below, since the 1970s Congress has repeatedly used "Native Hawaiian" to refer to all indigenous Hawaiians without regard to blood quantum. *See* note 4, *infra*.

have for centuries attempted to do with respect to America's other indigenous people. The real discrimination that is afoot here is the notion that indigenous Hawaiians may—indeed, according to petitioner, *must*—be treated differently from all other indigenous people.

There is no basis in either the Fifteenth or Fourteenth Amendment to establish such an unequal regime, and to compound the legitimate, congressionally recognized grievances of Hawaiians by according them second-class status among the Nation's indigenous people. And this case, in any event, provides a singularly ill-suited vehicle for doing so. Petitioner has not challenged the validity of the trusts established for the benefit of indigenous Hawaiians, or the Office of Hawaiian Affairs ("OHA") that administers those trusts. Rather, petitioner's only complaint—as both the District Court and Court of Appeals took pains to emphasize—lies with the decision to limit selection of trustees of the unchallenged trusts to the only people with a beneficial interest in them—indigenous Hawaiians. Because that limitation is not based on race, the judgment below should be affirmed.

STATEMENT OF THE CASE

1. The Nation's fiftieth State is its most remote, a chain of islands dotting the Pacific Ocean more than 2000 miles from the American mainland. The history of the indigenous people of Hawaii is in many respects as unique as the Islands themselves. But generally speaking, the story of indigenous Hawaiians fits the same basic pattern of events that mark the history of America's other aboriginal people. Westerners "discovered" the land centuries after humans first arrived there and organized a society; the newcomers asserted or acquired title to the land and displaced the original inhabitants from their homelands; and there eventually came an acknowledgment on the part of the new sovereign—the United States—that with the exercise of dominion over a land that

others had once known as theirs came a special obligation to and relationship with those once-sovereign, indigenous people.

a. It is believed that Hawaii's first inhabitants migrated there from other islands in the South Pacific, or perhaps even from the Americas, more than a millennium ago.[2] They "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion," and were "organized as a Nation." 42 U.S.C. § 11701(1), (4); *accord* 20 U.S.C. § 7902(1). *See* J.A. 58-59. The first recorded foreign contact with this society occurred in 1778, when Captain James Cook happened upon the Islands on the morning of January 18, dropped anchor off the village of Waimea on Kauai, and was met by Islanders whom he and his crew called "Indians." Nearly 5000 miles away, America was fighting for its independence. *See* 1 Kuykendall, *supra*, at 3-28.

Like the second-comers to the American mainland, Cook and his followers wrought radical changes in the aboriginal society. From 1795 to 1810, Kamehameha I—aided by Western arms and allies—brought the Islands under his control and established the Kingdom of Hawaii. Over the following decades, the communal land tenure system was dismantled, and the Islands' four million acres of land divvied up. The King set aside 1.5 million acres for the Island chiefs and people, known as "Government lands," and kept a million acres for himself and his heirs, known as "Crown lands." The remaining 1.5 million acres were conveyed separately to the Island chiefs. Foreigners not only acquired large tracts of now "private" land, but gained great economic and political influence; meanwhile,

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2 Most believe that the first Hawaiians came from the Society Islands (Tahiti), 2700 miles to the south. *See* 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 3 (1968). Some, however, have hypothesized that they were American Indians from the Pacific Northwest, nearly 2700 miles to the northeast. *See* Thor Heyerdahl, *American Indians in the Pacific* 161-168 (1952).

the population and general condition of indigenous Hawaiians declined rapidly. *See* Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 848-861 (1975); Lawrence H. Fuchs, *Hawaii Pono: A Social History* 251 (1961); J.A. 59-60. The United States recognized the Kingdom as a sovereign and independent country, and entered into treaties with it. *See* Apology Bill, Pub. L. No. 103-150, 107 Stat. 1510, 1510 (1993), reproduced at J.A. 11-18.

In 1893 the Kingdom was overthrown by American merchants. In furtherance of this *coup d'état*, the United States Minister to Hawaii, John L. Stevens, caused United States Marines to land in Honolulu and position themselves near Iolani Palace. This had the desired effect and, on January 17, 1893, Queen Liliuokalani relinquished her authority—under protest—to the United States. The revolutionaries formed the Republic of Hawaii and sought annexation to the United States. But, in Washington, President Cleveland refused to recognize the new Republic, and denounced—as did Congress a century later—the role of United States agents in overthrowing the monarchy, which the President likened to an "'act of war, committed * * * without authority of Congress,'" and called a "'substantial wrong.'" 107 Stat. at 1511 (quoting address). *See* 42 U.S.C. § 11701(7)-(9).

The Republic expropriated the Government and Crown lands, without compensating the Queen or anyone else. *See Levy*, 63 Cal. L. Rev. at 863. On July 7, 1898, the Republic realized its goal of annexation under the Newlands Joint Resolution. As part of the annexation, the Republic "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii, without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign," to the United States. 107 Stat. at 1512. As Congress has recognized, "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or

over their national lands to the United States." *Id.* Indeed, they were given no say in the matter.

The Territory of Hawaii was established in 1900. The Organic Act reaffirmed the cession of Government and Crown lands to the United States, and put the lands "in the possession, use, and control of the government of the Territory of Hawaii * * * until otherwise provided for by Congress." Organic Act, § 91, 31 Stat. 141, 159 (1900). It did not address—let alone attempt to resolve—the land claims of indigenous Hawaiians. Hawaii remained a Territory until 1959, when it entered the Union.

b. By the time the stars and stripes was raised over Hawaii in 1898, the era of treaty-making with the indigenous people of the American continent had come to an end. As a result—as is true with respect to Alaska Natives—the United States never entered into treaties with indigenous Hawaiians as such. Similarly, Congress never formally recognized or dealt with Hawaiians as "Indian tribes," or attempted to sequester them on reservations. Instead, Congress subjected Natives to the same territorial laws as non-Natives. *See Metlakatla Indian Community* v. *Egan*, 369 U.S. 45, 51 (1962); Pet. App. 32a-33a. Yet—as is true with respect to Alaska Natives—Congress has recognized that it has a special relationship with indigenous Hawaiians, and has sought to enable them to benefit in some measure from their homelands.

In 1921 Congress passed the Hawaiian Homes Commission Act ("HHCA"), 42 Stat. 108 (1921). The HHCA placed about 200,000 acres of the lands ceded to the United States in 1898 by the Republic under the jurisdiction of the Hawaiian Homes Commission—an arm of the Territorial Government—to provide residential and agricultural lots for Native Hawaiians. HHCA § 203. "Native Hawaiian" was defined to include "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." *Id.* § 201(a)(7). Congress found support for the HHCA "in previous enactments granting Indians * * * special privileges in obtaining and using the public lands," H. R. Rep. No. 839, 66th Cong., 2d Sess. 11 (1920), and has since found that the HHCA "affirm[ed] the trust relationship between the United States and the Native Hawaiians." 42 U.S.C. § 11701(13); *accord* 20 U.S.C. § 7902(8).[3]

Congress took a more elaborate approach in the Statehood Act. First, it conveyed to the State the 200,000 acres of Hawaiian Home Lands set aside for the benefit of Native Hawaiians under the HHCA and—"[a]s a compact with the United States relating to the management and disposition of [those] lands"—required the State to adopt the HHCA as part of its *own* constitution. Statehood Act, Pub. L. No. 86-3, § 4, 73 Stat. 4, 5 (1959). Second, it conveyed to the State the bulk of the other lands ceded to the United States in 1898 by the Republic, but required the State to hold these lands "as a public trust" for, *inter alia*, "the betterment of the conditions of native Hawaiians, as defined in the [HHCA], * * * in such a manner as the constitution and laws of * * * [Hawaii] may provide." *Id.* § 5(b), (f). Congress left with the Federal Government the ultimate authority to enforce this trust by authorizing the United States to bring suit against the State for any "breach of [the] trust." *Id.* § 5(f).

Congress did not stop there. "In recognition of the special relationship which exists between the United States and the Native Hawaiian people, [it] has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut

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[3] Testifying in support of the HHCA, Secretary of the Interior Franklin D. Lane analogized Native Hawaiians to American Indians. *See Hearings Before the House Comm. on the Territories on the Rehabilitation and Colonization of Hawaiians and Other Proposed Amendments to the Organic Act of the Territory of Hawaii*, 66th Cong. 129-130 (1920) (basis for special preference to Native Hawaiians is "an extension of the same idea" relied upon to grant such preferences to American Indians); H.R. Rep. No. 839, *supra*, at 4 ("the natives of the islands * * * are our wards * * * for whom in a sense we are trustees").

communities." 20 U.S.C. § 7902(13). Thus, Congress has expressly included "Native Hawaiians"—which it has repeatedly defined since the 1970s to mean *any* descendant of the Islands' inhabitants prior to 1778, without regard to blood quantum[4]—in scores of statutory programs benefiting indigenous people across the Nation. *See* 42 U.S.C. § 11701(19)-(20) (listing statutes); 20 U.S.C. § 7902(13)-(16) (same); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol. Rev. 95, 106 n.67 (1998).

In 1993 Congress passed a Joint Resolution signed into law "apologiz[ing] to Native Hawaiians" for the United States' role in the *coup*, and "the deprivation of the rights of Native Hawaiians to self-determination." 107 Stat. at 1513. The law specifically acknowledged that "the health and well-being of the Native Hawaiian people is intrinsically tied to * * * the land," that land was taken from Hawaiians without their consent or compensation, and that indigenous Hawaiians have "never directly relinquished their claims * * * over their national lands." *Id.* In other recent acts, Congress has expressly affirmed the "special"—and "trust"—relationship between the United States and Hawaiians, and has specifically recognized Hawaiians as "a distinct and unique indigenous people." 42 U.S.C. § 11701(1), (13), (15), (16), (18); *accord* 20 U.S.C. § 7902(1), (10).

c. In light of Hawaii's unique historical and geographic circumstances, it is perhaps not surprising that Congress chose to delegate to the State authority to manage the

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4 *See, e.g.*, 16 U.S.C. § 470w(17) (" 'Native Hawaiian' means any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in * * * Hawaii"); 20 U.S.C. § 80q-14(11) (same); 20 U.S.C. § 4402(6) (same); 20 U.S.C. § 7118(b) (same); 20 U.S.C. § 7912(1) (same); 25 U.S.C. § 3001(10) (same); 29 U.S.C. § 1503(11) (same); 42 U.S.C. § 254s(c) (same); 42 U.S.C. § 2992c(3) (same); 42 U.S.C. § 3057k (same); Apology Bill, 107 Stat. at 1513 (same).

public trust for Native Hawaiians. The pulls of federalism are particularly strong in the case of the most isolated land mass in the world, some 5000 miles from our national Capital. No other State has been given such responsibility with respect to an indigenous people. The people of Hawaii were required to accept this responsibility as a condition of statehood, and did so. *See Ahuna* v. *Department of Hawaiian Home Lands*, 640 P.2d 1161, 1168 (Haw. 1982); 20 U.S.C. § 7902(10); 42 U.S.C. § 11701(16).

In 1978 Hawaii—reaffirming the "solemn trust obligation and responsibility to native Hawaiians"—amended its constitution to establish OHA, to better "address the needs of the aboriginal class of people of Hawaii." Haw. Rev. Stat. § 10-1(a). OHA was empowered to receive a share of the revenues generated by the lands conveyed to the State pursuant to § 5(f) of the Statehood Act, manage those and certain other assets on behalf of indigenous Hawaiians, and, more generally, promote Hawaiian affairs. *See* Haw. Const. art. XII, §§ 4-6; J.A. 35 (Comm. Rep. No. 59). OHA also receives federal funds and helps to administer federal programs for indigenous Hawaiians. *See* 42 U.S.C. § 2991b-1.

OHA's overriding purpose is the "betterment of conditions of native Hawaiians" and "Hawaiians." Haw. Rev. Stat. § 10-3(1)-(2). "Native Hawaiian" means "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the [HHCA]." *Id.* § 10-2. "Hawaiian" includes "any descendant of the aboriginal people inhabiting the Hawaiian Islands * * * in 1778." *Id.* The latter definition was added to bring state law "in line with the current policy of the federal government to extend benefits for Hawaiians to *all* Hawaiians *regardless of blood quantum*." J.A. 46 (Comm. Rep. No. 59) (emphases added). *See* note 4, *supra*.

OHA administers two separate trust funds. The principal fund consists of 20% of revenues generated from § 5(f) lands. It is administered for the benefit of Native Hawaiians. The other fund consists of appropriations from Congress and the State. It is administered for the benefit of Hawaiians (including Native Hawaiians). *See* Haw. Rev. Stat. §§ 10-2, 10-3(1), 10-13.5; Pet. App. 6a.

OHA is a "body corporate," "separate" and "independent of the [state] executive branch." Haw. Rev. Stat. § 10-4. It was modeled on a public university "to give it maximum independence." J.A. 52 (Comm. Rep. No. 13); *see id.* 61, 65 (debates). It does not have the authority to tax and does not administer programs for non-beneficiaries. It may sue and be sued by the State of Hawaii—and *has* sued and been sued by the State. OHA employees are not part of the state civil service system. Haw. Rev. Stat. § 10-12. In short, "[t]he status of [OHA] is"—as it was intended to be—"unique and special." J.A. 41 (Comm. Rep. No. 59). *See* Pet. App. 42a-43a.

OHA is governed by a board of trustees elected by Hawaiians. Haw. Const. art. XII, § 5. *See* Haw. Rev. Stat. § 13D-3(b). In establishing this scheme, the Constitutional Convention Committee "concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." J.A. 39 (Comm. Rep. No. 59). This approach would "enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." *Id.* 40. *See also id.* ("the board should be elected by all beneficiaries" since "[c]ertainly they would best protect their own rights"). This approach also would promote "self-determination and self-government" of the Hawaiian people. *Id.* 53 (Comm. Rep. No. 13).

Hawaii's efforts to meet its delegated trust responsibility have not gone unnoticed in Washington. Congress has recognized that the "constitution and statutes of the State of Hawaii * * * acknowledge the distinct land rights of the Native Hawaiian people as beneficiaries of the public lands trust," and "reaffirm and protect the unique right of the Native Hawaiian people to practice and perpetuate their cultural and religious customs, beliefs, practices, and language." 42 U.S.C. § 11701(3); *see* 20 U.S.C. § 7902(21). In addition, Congress has appropriated funds for and repeatedly recognized OHA. *See, e.g.*, 16 U.S.C. § 470w(18); 20 U.S.C. § 80q-11(b)(2); *id.* § 4441(c)(2)(B); *id.* § 7904(b)(3); *id.* § 7912(5); 25 U.S.C. § 3001(12); 42 U.S.C. § 2991b-1. Not once has Congress indicated that the State has strayed from its delegated trust responsibility, or improperly expanded its role.

2. Like millions of Americans, petitioner traces his roots to individuals who inhabited what is now American soil before the United States exercised sovereignty over it. Petitioner, however, is no more an indigenous Hawaiian than the descendants of Miles Standish are American Indians. As a result, petitioner is not a subject of the special relationship between the United States and Hawaiians, a beneficiary of the OHA trusts, or within the federal and state law definition of "Hawaiian." In March 1996 he nevertheless applied to vote in the special election for OHA trustees. His application was denied. Pet. App. 7a.

a. Shortly thereafter, petitioner brought this action pursuant to 42 U.S.C. § 1983, challenging "his exclusion from voting for OHA trustees on the grounds that conditioning eligibility on being Hawaiian violates * * * the Fourteenth and Fifteenth Amendments of the United States Constitution." Pet. App. 7a. In May 1997 the District Court granted summary judgment for the State, concluding that the challenged classification "is not based

upon race, but upon the recognition of the unique status of Native Hawaiians" under federal law. *Id.* 35a. *See also id.* 29a-34a, 38a. Relying on this Court's decision in *Morton v. Mancari,* 417 U.S. 535 (1974), the court then held that the statutory scheme would not violate the Fourteenth or Fifteenth Amendments if "it can be tied rationally to the fulfillment of the unique obligation to Native Hawaiians." Pet. App. 35a. That test was met because "[t]he State of Hawaii [has simply] limited the electoral franchise to those who are to benefit from OHA's programs," *id.* 36a—the indigenous people who are the subject of the federal trust obligation.

b. The Court of Appeals affirmed. The court emphasized that the constitutionality of "the trusts and OHA is not challenged." Pet. App. 9a; *see id.* 1a-2a, 9a n.11. Taking the unchallenged trust structure "as given," the court considered "only whether Hawaii may limit those who vote in special trustee elections to those for whose benefit the trust was established." *Id.* 2a, 9a. In answering that question, the court—relying on *Mancari*—refused "to invalidate the voting restriction simply because it appears to be race-based without also considering the unique trust relationship that gave rise to it." *Id.* 14a. As the court explained, "the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal people who subsisted in the Islands in 1778 and still live there—which is not challenged in this appeal." *Id.* 17a.

The court ultimately concluded that the classification was based on beneficiary status, not race. "[T]he franchise for choosing trustees in special elections may be limited to Hawaiians because Hawaiians are the only group with a stake in the trust and the funds that OHA trustees administer." *Id.* 2a. Hawaiians "have the right to vote as such"—*i.e.*, as beneficiaries—"not just because they are Hawaiian." *Id.* "For this reason, neither the

Fifteenth Amendment nor Equal Protection Clause precludes Hawaii from restricting the voting for trustees to Hawaiians and excluding all others." *Id.* 2a-3a.[5]

A petition for rehearing and suggestion of rehearing en banc were denied, with no judge voting for rehearing. *Id.* 44a. This Court granted certiorari.

SUMMARY OF ARGUMENT

I. In its broadest terms, this case raises profound issues about Congress' authority to recognize and deal with the Nation's indigenous people. But the Court need not reach those issues if it follows its customary practice and decides the case based on the somewhat unusual procedural posture in which it comes to the Court. As the courts below emphasized, petitioner does not challenge the trusts established for the benefit of indigenous Hawaiians, nor the office that administers those trusts. His sole challenge is to the provision specifying that only beneficiaries of the unchallenged trusts may select the trustees who administer them. That provision, however, does not violate the Fifteenth Amendment—and is not subject to strict scrutiny under the Fourteenth—because it does not draw any distinction "on account of race." U.S. Const. amend. XV, § 1.

The challenged classification is based on the principle that only those with a direct interest in trust assets should decide who will manage them. That is a complete answer to petitioner's charge that the classification is race-based, particularly since petitioner has expressly eschewed any challenge to the underlying trusts themselves, and this Court—in the exercise of judicial restraint—typically pre-

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[5] Both the District Court and the Court of Appeals also concluded that—given OHA's narrow mission and limited powers—limiting the franchise to those disproportionately affected by its activities—Hawaiians—accorded with the "special purpose election" cases. *See* Pet. App. 17a, 37a-43a; *Salyer Land Co.* v. *Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973).

sumes the validity of unchallenged laws. The franchise limitation is not only race-neutral, it also makes perfect sense. Expanding the electorate to non-beneficiaries would create a possible conflict of interest for the trustees, bound by fiduciary duty to safeguard and promote the interests of trust beneficiaries.

II. In any event, petitioner's claim also fails on the open-ended terms in which he presents it to this Court. Classifications based on Congress' decision to assume a special trust relationship with an indigenous people are not based on race, but rather the unique legal and political status that such a relationship entails. Congress has expressly provided that classifications involving indigenous Hawaiians should be treated the same as those involving American Indians, Alaska Natives, and the other indigenous people over whose aboriginal lands the United States has extended its domain. This Court has repeatedly reaffirmed that such judgments are peculiarly within Congress' prerogative to make. Centuries of jurisprudence, not to mention an entire title of the United States Code, are built on the understanding that such classifications are not race-based.

This regime is fully applicable to indigenous Hawaiians. That is true not only because Congress has said so, but because the Framers of the Constitution drew no distinctions among different groups of indigenous people in conferring power to deal with such groups on Congress, and the Framers of the Civil War Amendments never envisioned that those amendments would restrict the ability of Congress to exercise that power. Indeed, while Congress has been given nearly free reign since the founding in the realm of Indian affairs—including in deciding when the United States ought to assume or terminate a trust relationship with an indigenous people—petitioner and his amici would now subject Congress' every move in this realm to the strictest judicial scrutiny. It is no answer that

the law challenged here was passed by a State. Congress was free within the framework of our Federal System to delegate to the State of Hawaii responsibility in administering the federal trust. Congress not only has expressly done so, but has repeatedly ratified Hawaii's efforts to meet that responsibility, including through OHA.

Even if this case were not analyzed like every other case dealing with legislation addressed to a congressionally recognized indigenous people, the challenged classification would still not be race-based. It limits the franchise to those whose ancestors were from a particular place at a particular time, regardless of race. Hawaii was fully justified in restricting the franchise to those whose ancestors were from the Hawaiian Islands in 1778, because that definition captures perfectly the aboriginal people of Hawaii with unique ties to the land. That is the same definition Congress has used in confirming that Hawaiians should be treated the same as all other Native Americans. This Court should defer to that determination, rather than overturn Congress' judgment and relegate Hawaiians to second-class status among the Nation's aboriginal people.

III. Because the challenged classification is not race-based, it does not violate the Fifteenth Amendment. But petitioner's Fifteenth Amendment claim fails for another reason: that Amendment does not apply to special purpose elections for functionaries whose duties disproportionately affect a specific class of voters. That is an apt description of OHA trustees, who lack general governmental powers and are duty bound to act solely in the best interests of the trust beneficiaries, not the general public. The conclusion that the Fifteenth Amendment does not apply to the selection of OHA trustees squares with this Court's decisions holding that the Constitution does not confer upon citizens a right to vote in narrow special purpose elections in which they cannot show a direct interest. This does not mean the States are free to

engage in racial discrimination in connection with such special purpose elections, but rather that such a claim is analyzed under traditional equal protection review.

IV. Regardless of what scrutiny is applied, the challenged classification passes constitutional muster. Limiting the franchise for trustees of the unchallenged trusts to the sole beneficiaries of those trusts—indigenous Hawaiians—readily meets the more deferential review this Court has unfailingly applied to governmental efforts (including state efforts) to meet the federal trust responsibility to an indigenous people. The scheme is a natural effort to promote self-governance by the governed, the same end advanced by the challenged provision in *Mancari*. Indeed, the challenged statute in this case satisfies strict scrutiny. As the Court of Appeals held, the classification is "precisely tailored" to the compelling interest in honoring the federal trust responsibility to indigenous Hawaiians. Pet. App. 17a.

Congress has expressly confirmed a special trust relationship with Hawaiians, extending to them the same rights and privileges as every other indigenous people in this land, and has delegated to the State responsibility to administer this special relationship. The challenged provision in this case is a reasonable and constitutional effort to honor the federal trust. The judgment of the Court of Appeals should be affirmed.

ARGUMENT

I. THE COURT SHOULD DEAL WITH THIS CASE AS IT CAME TO IT AND HOLD THAT THE STATE HAS PERMISSIBLY DEFINED THE FRANCHISE IN TERMS OF BENEFICIARY STATUS.

This Court's customary practice is to "deal with the case as it came here and affirm or reverse based on the ground relied upon below." *Peralta* v. *Heights Med. Ctr., Inc.*, 485 U.S. 80, 86 (1988). *Accord Bragdon* v.

Abbott, 118 S. Ct. 2196, 2205 (1998). Both the Court of Appeals and District Court decided this case on narrow grounds, taking pains to emphasize what indisputably was *not* challenged—"the trusts and OHA." Pet. App. 9a; *see supra* at 12. "[A]ccept[ing] the trusts and their administrative structure as we find them, and assum[ing] that both are lawful, * * * it follows that the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." Pet. App. 9a-10a (footnote omitted). In other words, taking the unchallenged trusts and OHA "as given," the challenged classification turns on beneficiary status, not race. *Id.* 9a.

Petitioner argues that "[t]he Ninth Circuit's reasoning amounts to an evasion of its constitutional responsibility." Br. 49. But the Court of Appeals merely heeded the basic precept that federal courts should not question the validity of laws—especially state laws—that have not been challenged by the parties and, in a similar vein, should generally accord laws a presumption of constitutionality in reviewing the validity of what *has* been challenged.

Rostker v. *Goldberg*, 453 U.S. 57 (1981), is a good example. There, the Court considered an equal protection challenge to the Military Selective Service Act, which required only males to register for the draft. The underlying statutes and executive policies excluding women from combat were not challenged. Accepting the validity of those statutes and policies, the Court held that "[t]he fact that Congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops." *Id.* at 79. As the Court explained, "[t]he Constitution requires that Congress treat similarly situated

persons similarly, not that it engage in gestures of superficial equality." *Id.*[6]

So too here, against the backdrop of the unchallenged trust structure, the State's decision to limit the franchise to beneficiaries makes perfect sense—on entirely race-neutral terms. Limiting the franchise to beneficiaries is "the best way to insure proper management and adherence to the needed fiduciary principles," "enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary." J.A. 39-40 (Comm. Rep. No. 59). Opening the election to non-beneficiaries—such as petitioner—could in turn create a conflict of interest on the part of trustees. *See NLRB* v. *Amax Coal Co.*, 453 U.S. 322, 329 (1981) ("a trustee bears an unwavering duty of complete loyalty to the beneficiary of [a] trust, *to the exclusion of the interests of all other parties*") (emphasis added). In addition, limiting the franchise to those with a beneficial interest in the trusts squares with the principles established by *Salyer Land Co.* v. *Tulare Lake*

[6] There are numerous other examples that belie petitioner's "judicial abdication" argument. *See, e.g., Suitum* v. *Tahoe Reg'l Planning Agency*, 520 U.S. 725, 744 (1997) (because petitioner "does not challenge the validity of the agency's regulations" "her litigating position assumes that the agency may validly bar her land development just as all agree it has actually done, and her only challenge to the TDRs raises a question about their value, not about the lawfulness of issuing them"); *Bell* v. *New Jersey*, 461 U.S. 773, 791 (1983) ("New Jersey has not challenged the [statutory] program itself as intruding unduly on its sovereignty, but challenges only the requirement that it account for funds that it accepted under admittedly valid conditions with which it failed to comply. If the conditions were valid, the State had no sovereign right to retain funds without complying with those conditions") (citations omitted); *L.P. Steuart & Bro., Inc.* v. *Bowles*, 322 U.S. 398, 403, 407 (1944) (accepting validity of unchallenged statutory program authorizing executive department to issue certain orders, the challenged order was plainly authorized).

Basin Water Storage District, supra. See Pet. App. 17a, 37a-43a; *infra* at 41-45.

This is not to say that a State or Congress may "insulate" from judicial review laws that—if challenged—might warrant further judicial inquiry. Pet. Br. 49 (quotation omitted). Rather, we simply invoke the basic principle of judicial restraint that federal courts—whose grave authority to determine issues of constitutionality derives, after all, from the more mundane duty to decide cases and controversies, *see Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177-178 (1803)—should only question the laws challenged by the parties before them. Such restraint is especially called for when, as here, a federal court considers the constitutionality of a state law.[7]

That this Court has declined to extend a presumption of constitutionality to laws it has determined are race-based does not affect the inquiry in this case. *See* Pet. Br. 46. In the first place, as we explain below, neither the challenged law nor the underlying trust structure discriminates on account of race. But more fundamentally, in the cases cited by petitioner the laws that this Court held were not entitled to a presumption of constitutionality had been *challenged*. We are aware of no case—certainly petitioner has cited none—in which this Court has declined to presume the validity of a law that had not been challenged. Considerations of federalism alone make this case an ill-suited candidate to be the first.

To be sure, this Court has "discretion" to consider the validity of unchallenged provisions. *United States Nat'l Bank of Or.* v. *Independent Ins. Agent of Am., Inc.*, 508 U.S. 439, 447 (1993). But the Court generally declines to take an issue up for the first time itself and, thus, typically refuses to address issues that were not decided below,

[7] The "private will" cases cited by petitioner are readily distinguishable. *See* Br. 46-47. Private wills themselves are not subject to constitutional challenge, and are not entitled to a presumption of constitutionality.

especially when, as here, they also fall outside the question presented. *See, e.g., Cass County, Minn.* v. *Leech Lake Band of Chippewa Indians*, 118 S. Ct. 1904, 1911 n.5 (1998); *Pennhurst State Sch. & Hosp.* v. *Halderman*, 451 U.S. 1, 30 (1981). In *National Bank of Oregon* the Court of Appeals had requested briefing on the unchallenged provision before "resolving the status of th[at] provision." 508 U.S. at 446. Here, the Court of Appeals never decided the constitutionality of the unchallenged trusts or OHA, leaving a blank slate for this Court.

Given these first principles of judicial restraint, the Court should decide this case on the narrow terms on which it reached this Court's steps, and hold that the challenged classification is permissibly based on beneficiary status, not race. In any event, as we explain below, petitioner's challenge also fails on the unrestrained terms in which he and his amici present it to this Court.

II. IN ADMINISTERING THE FEDERAL TRUST RESPONSIBILITY TO INDIGENOUS HAWAIIANS, THE STATE HAS NOT DEFINED THE FRANCHISE ON ACCOUNT OF RACE.

A. The Centuries-Old Understanding Is That Legislation Addressed To America's Once-Sovereign, Indigenous People Is Not Race-Based.

Because Hawaii looks to and draws authority to deal with indigenous Hawaiians from federal law, *see supra* at 6-9, consideration of petitioner's challenge to the voting provision and the underlying trust structure must begin with Congress' "plenary power over Indian affairs." *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 343 (1998). The legitimacy of that power—and two centuries of this Court's decisions validating it—depend on the understanding that classifications singling out "Indians" for special treatment are not race-based within the meaning of the Civil War Amendments. As we explain in Part II.B *infra*, there is no reason to adopt a different regime in the case of indigenous Hawaiians.

The Framers understood that one of the fundamental tenets of nationhood was the ability to deal with the extension of sovereignty over lands occupied by aboriginal groups, whom they called "Indians" or "tribes." Thus, "[f]rom almost the beginning the existence of federal power to regulate and protect the Indians and their property * * * has been recognized." *Board of Comm'rs of Creek County* v. *Seber*, 318 U.S. 705, 715 (1943) (citing *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515 (1832)). While not absolute, the Court has characterized this power as "plenary," and recognized that under our system of separated powers it lies within the province of Congress. *E.g., Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998); *Yankton Sioux Tribe*, 522 U.S. at 343; *see also United States* v. *McGowan*, 302 U.S. 535, 539 (1938) ("Congress possesses the broad power of legislating for the protection of the Indians *wherever they may be* within the territory of the United States.") (quotation omitted; emphasis added).

"The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Morton* v. *Mancari*, 417 U.S. at 551-552. It derives from the Indian Commerce Clause (Art. I, § 8, cl. 3), *e.g., Native Village of Venetie*, 522 U.S. at 531 n.6; Treaty Clause (Art. II, § 2, cl. 2), *e.g., McClanahan* v. *Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973); Property Clause (Art. IV, § 3, cl. 2), *e.g., United States* v. *Kagama*, 118 U.S. 375, 379-380 (1886); and Debt Clause (Art. I, § 8, cl. 1), *e.g., United States* v. *Sioux Nation of Indians*, 448 U.S. 371, 397 (1980). Given the centuries-worth of judicial and legislative precedent in this area, this Court has recognized that Congress' broad authority over Indian affairs "cannot be doubted." *Seber*, 318 U.S. at 715.

Congress has exercised this authority on countless occasions, crafting whole eras of Indian policy and legislating scores of rights, privileges, and burdens for the Na-

tion's first sovereigns and their descendants—including American Indians in the lower 48 States, Alaska Natives, *and* Hawaiians. Indeed, "[f]rom the commencement of our government, Congress has passed acts to regulate trade and intercourse with the Indians." *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 556. Today an entitre title of the United States Code (Title 25) is devoted to "Indians," and Natives from across the land—including from Hawaii—are singled out for special treatment in virtually every other title of the Code.

This authority extends to voting matters. The Menominee Restoration Act of 1973, 25 U.S.C. § 903b, for example, established federally supervised elections in which all Menominees—members of a community whose tribal status had been terminated—with "at least one-quarter degree of Menominee Indian blood," and their "descendants," were entitled to vote on a self-governance matter. Likewise, the Alaska Native Claims Settlement Act of 1971 ("ANCSA"), 43 U.S.C. § 1601, provides for the establishment of Native-run state corporations, and explicitly limits voting rights on certain matters to "Native" shareholders and their "descendant[s]," without regard to tribal status. *Id.* § 1606(h)(2)(C); *see id.* § 1606(h)(3)(D); *Broad* v. *Sealaska Corp.*, 85 F.3d 422, 429-430 (9th Cir. 1996) (discussing ANCSA voting rights). In addition, the Indian Reorganization Act ("IRA") expressly limits voting rights to tribal Indians forming IRA governments. 25 U.S.C. § 476. *See also, e.g., id.* § 504 (limiting voting rights in "local cooperative associations" to "Indians" residing within the prescribed district). Native elections are front page news in many Western States, but only Natives are allowed to vote.

These laws are a product of the special relationship that the United States has assumed with Native Americans. Chief Justice Marshall recognized this relationship in *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831), when he analogized the relationship between American Indians and the United States to that of a "ward

to his guardian." In subsequent cases, the Court has acknowledged that this relationship stems in part from the fact that, in expanding westward with the frontier, the Federal Government "took possession of [Indians'] lands, sometimes by force, leaving them * * * needing protection." *Seber*, 318 U.S. at 715. *See County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 253 (1985); *Seminole Nation* v. *United States*, 316 U.S. 286, 296-297 (1942). *See also Morton* v. *Ruiz*, 415 U.S. 199, 236 (1974) ("The overriding duty of our Federal Government to deal fairly with Indians wherever located has been recognized by this Court on many occasions.").

"It is for [Congress], and not for the courts," to determine when the United States should assume such a relationship with an indigenous people, and to decide "when the true interests of the Indian require his release from such condition of tutelage." *United States* v. *Candelaria*, 271 U.S. 432, 439 (1926) (quotation omitted). *Accord United States* v. *Chavez*, 290 U.S. 357, 363 (1933); *United States* v. *Nice*, 241 U.S. 591, 597 (1916). Likewise, the Constitution gives Congress—not the courts—authority to acknowledge and extinguish claims based on aboriginal status. "The American people have compassion for the descendants of those Indians who were deprived of their homes and hunting grounds by the drive of civilization," and Congress may address the consequences of our Nation's expansion "as a matter of grace, not because of legal liability." *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 281-282 (1955).

Justice Jackson put it this way: "The generation of Indians who suffered the privations, indignities, and brutalities of the westward march of the whites have gone to the Happy Hunting Ground, and nothing that we can do can square the account with them. Whatever survives is a moral obligation resting on the descendants of the whites to do for the descendants of the Indians what in the conditions of this twentieth century is the decent thing."

Northwestern Bands of Shoshone Indians v. *United States*, 324 U.S. 335, 355 (1945) (Jackson, J., concurring). Even when there is "no legal obligation[]" to redress such wrongs, Congress may make such amends as "its judgment dictates." *Id.* at 358. *See Blackfeather* v. *United States*, 190 U.S. 368, 373 (1903) ("The moral obligations of the government toward the Indians, whatever they may be, are for Congress alone to recognize").

Congress and this Court have often referred to indigenous people—especially Indians and tribes—in terms of race. Indeed, this Court interpreted one of Congress' earliest uses of the word "tribe" to be based in part on a group's "race." *See United States* v. *Candelaria*, 271 U.S. at 442 ("Indian tribe" in Nonintercourse Act refers to "a body of Indians of the same or a similar race"); *Montoya* v. *United States*, 180 U.S. 261, 266 (1901) (same); *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846) (use of "tribe" "does not speak of members of a tribe, but of the race generally—of the family of Indians"). Yet until recently, it has never been suggested that Indian legislation is race-based within the meaning of the Civil War Amendments. If it were, Congress' plenary authority over Indian affairs would have been severely circumscribed by those Amendments.[8]

In fact, this Court has held that "federal regulation of Indian affairs is *not* based upon impermissible classifications." *United States* v. *Antelope*, 430 U.S. 641, 646

[8] Indeed, many of this Court's decisions—including recent ones like *Native Village of Venetie*, 522 U.S. at 534 ("Whether the concept of Indian country should be modified is a question *entirely* for Congress.") (emphasis added)—emphasize the breadth of Congress' authority over Indian affairs. There could scarcely be a greater upheaval in the separation of powers than to go from treating a matter as essentially within Congress' exclusive domain to subjecting it to the strictest possible judicial review, as petitioner and his amici urge the Court to do here.

(1977). *See id.* at 645 ("The decisions of this Court leave no doubt that federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications."). Instead, such regulation is based on the unique legal and political status of indigenous groups that enjoy a congressionally recognized, trust relationship with the United States. That is the basis for this Court's unanimous decision in *Morton* v. *Mancari*, *supra*.

In *Mancari* non-Indians challenged an employment preference for Indians on the ground that it discriminated "on the basis of race." 417 U.S. at 540. This Court disagreed, grounding its decision on "[t]he plenary power of Congress to deal with the special problems of Indians" and "the assumption of a 'guardian-ward' status." *Id.* at 551-552. As the Court noted, Congress has directed innumerable laws to Native Americans; "[i]f these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. Viewed in this "historical and legal context," the challenged preference was based on the "unique legal" and "political" status of American Indians, not race. *Id.* at 551, 553-554 & n.24.

The Court has embraced the *Mancari* rationale for reviewing "legislation that singles out Indians for particular and special treatment" in numerous cases. *Id.* at 554-555.[9] Applying it, the Court "has never overturned a statute or treaty affecting Indians or natives." *Williams*

[9] *See, e.g., Duro* v. *Reina*, 495 U.S. 676, 692 (1990) (citing *Mancari*); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979) (quoting *Mancari*); *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979) (same).

v. *Babbitt*, 115 F.3d 657, 663 (9th Cir. 1997), *cert. denied*, 118 S. Ct. 1795 (1998). At the same time, the Court has repeatedly found "the argument that [Indian] classifications are 'suspect'" to be "untenable." *Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. at 501.

The conclusion that laws singling out indigenous groups are not race-based within the meaning of the Civil War Amendments surely would come as no surprise to the Reconstruction Congress. Between 1866 and 1875, Congress singled out Natives for special treatment in scores of statutes and treaties. *See* Felix S. Cohen, *Handbook of Federal Indian Law* 840-841 (1982) (listing some of these provisions). In addition, the Fourteenth Amendment itself acknowledges that Indians may continue to be singled out, excluding "Indians not taxed" for apportionment purposes. U.S. Const. amend. XIV, § 2. All this confirms the obvious: Americans did not take up arms against one another to limit Congress' authority to deal with American Indians, or Natives from more far flung places like Alaska or Hawaii.

Faced with the weight of history and this Court's precedents, petitioner and his amici are forced to suggest that this regime has been (or should be) "overruled" by the Court's recent "equal protection jurisprudence, particularly [*Adarand Constructors, Inc.* v. *Peña*, 515 U.S. 200 (1995)]." Br. 42 n.17; *see id.* 39 n.15. But neither *Adarand* nor *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469 (1989)—cases having nothing to do with Indian affairs—repudiates the principles discussed above. There is no reason to conclude that *Adarand* (or any other case) "meant to overrule, *sub silentio*, two centuries of jurisprudence," *Steel Co.* v. *Citizens for a Better Env't*, 523 U.S. 83, 98 (1998), and all but strip Congress of its plenary authority over Indian affairs.

B. There Is No Legal, Historical, Or Honorable Reason To Treat Indigenous Hawaiians Any Differently Under The Settled Regime.

Short of toppling this time-honored regime, petitioner's claim that the challenged law is race-based depends on the conclusion that this framework does not apply to indigenous Hawaiians. Petitioner would thus have this Court relegate Hawaiians to second-class status among the Nation's indigenous people.

1. Petitioner argues that a "special relationship" does not exist between indigenous Hawaiians and the United States, citing judicial decisions, executive materials, and secondary sources. *See* Br. 39-45. He neglects to mention, however, that *Congress* has expressly recognized such a relationship. *See* 20 U.S.C. § 7902(13) ("special relationship * * * exists between the United States and the Native Hawaiian people"); *id.* § 7902(8), (10), (12), (13), (14) (same); 42 U.S.C. § 11701(12) ("trust relationship"); *id.* § 11701(13), (14), (15), (16), (18), (19), (21) (same). Charged with meaning of which Congress is presumed to be aware, *see Goodyear Atomic Corp.* v. *Miller*, 486 U.S. 174, 184-185 (1988), these are not phrases that Congress lightly weaves into federal law. Congress has repeatedly affirmed this "unique legal relationship * * * through the enactment of Federal laws which extend to the Hawaiian people the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 42 U.S.C § 11701(19); *accord* 20 U.S.C. § 7902(13).

Perhaps petitioner is aware of these laws, because he also suggests that Congress lacks the authority to enter into such a relationship with Hawaiians, and to fulfill it in the same fashion Congress has done with respect to America's other indigenous people. *See* Br. 42-43. Here, too, petitioner is at odds with existing law. Congress

has expressly found that "[its] authority * * * under the United States Constitution to legislate in matters affecting the aboriginal or indigenous people of the United States includes the authority to legislate in matters affecting the native peoples of Alaska *and Hawaii*." 42 U.S.C. § 11701(17) (emphasis added). There is no reason for this Court to part with Congress here; Congress' broad authority over Indian affairs reaches the shores of Hawaii, too.

As discussed, Congress derives its power over Indian affairs from several constitutional fonts. Petitioner's principal argument is that this authority is limited by the words "Indian tribes" in the Indian Commerce Clause (Art. I, § 8, cl. 3). *See* Pet. Br. 39-40. As a textual —not to mention historical and common sense—matter, that argument should be rejected. In empowering Congress with the authority to single out and deal with indigenous societies they knew as "Indians" or "tribes," the Framers did not intend to restrict Congress' authority to deal with the extension of sovereignty over indigenous groups of which they may never have heard, but which would pose the same basic issues as Indians occupying the 1789 frontier.

The words "Indian" and "tribes" do not place Congress in this bind. In colonial America, "Indian" was still defined as "[a] native of India." Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789). That is whom Columbus thought he came upon when he discovered America. The Framers—and generations before them—of course knew that Columbus had not reached India, but they used "Indian" to refer to "the inhabitants of our Frontiers." Declaration of Independence para. 29 (1776). *See also* Thomas Jefferson, *Notes on the State of Virginia* 100 (William Peden ed. 1955) (1789) (referring to Indians as "aboriginal inhabitants of America"); Roger Williams, *A Key Into the Language*

of America 84 (1643) (aboriginals were "Natives, Savages, Indians, Wild-men," etc.); *The First Three English Books on America* 242 (Edward Arber ed. 1835) (" 'Indians' " were " 'all nations of the new founde lands.' ") (quoting Gonzalo Fernandez de Oviedo y Valdez, *De la Natural Hystoria de las Indias* (1526)). It is not surprising, then, that Captain Cook and his crew called the Islanders who greeted their ships in 1778 "Indians." 1 Kuykendall, *supra*, at 14 (quoting officer journal).

The word "tribe" is of no avail to petitioner either. At the founding, "tribe" meant "[a] distinct body of people as divided by family or fortune, or any other characteristic." Thomas Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789). *See* II Samuel Johnson, *A Dictionary of the English Language* (6th ed. 1785) (same); John Walker, *A Critical Pronouncing Dictionary and Expositor of the English Language* (1791) (same); William Perry, *The Royal Standard English Dictionary* 515 (1788) (defining "tribe" as "a certain generation of people").[10] That is—perhaps not coincidentally —how Congress has described Hawaiians, and fittingly so. *See* 42 U.S.C. § 11701(1) (Hawaiians are "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago"); 20 U.S.C. § 7902(1) (same). That "tribe" may mean something else today—in either legal or lay terms—should not circumscribe the authority conferred upon Congress to deal with indigenous people by those who ratified the Constitution in 1789.

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[10] This is consistent with how Chief Justice Marshall referred to Indian tribes in *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) at 559-560. He analogized them to "nations" and explained that "[t]he very term 'nation,' so generally applied to [Indian tribes], means 'a people distinct from others.' " *Id.* at 561. Hawaiians were not only a "Nation" in 1778, but were and remain a "distinct and unique indigenous people." 42 U.S.C. § 11701(1).

Congress' authority to deal with indigenous Hawaiians finds support in other provisions of the Constitution as well. This includes the Foreign Commerce Clause (Art. I, § 8, cl. 3), which authorizes Congress to legislate on account of the separate "Nation" that Hawaiians comprised prior to 1778. 42 U.S.C. § 11701(1). Another is the Debt Clause (Art. I, § 8, cl. 1), which confers upon Congress "broad constitutional power * * * to *define* and 'to pay the Debts * * * of the United States,' " including those of a "moral" or "honorary" kind. *United States* v. *Sioux Nation,* 448 U.S. at 397 (quoting Debt Clause) (emphasis added). *See Pope* v. *United States,* 323 U.S. 1, 9 (1944). Congress' recognition of the wrongs inflicted upon Hawaiians, *see* Apology Bill, 107 Stat. at 1513; 42 U.S.C. § 11701(8)-(11), and efforts to redress such wrongs—including by according Hawaiians the same special treatment accorded American Indians—are a constitutional and honorable attempt to do "what in the conditions of this twentieth century is the decent thing." *Northwestern Bands of Shoshone Indians,* 324 U.S. at 355 (Jackson, J., concurring).

2. Petitioner also argues that the *Mancari* rationale does not apply to indigenous Hawaiians because they "are not a federally recognized Indian tribe." Br. 39. *Mancari* is indeed addressed in part to federally recognized tribes; that is how the challenged preference in that case was written. *See* 417 U.S. at 535 n.24 (" 'To be eligible for [the preference] an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.' ") (quoting Bureau of Indian Affairs ("BIA") preference). But as this Court explained in *Mancari,* the understanding that Indian legislation is not race-based rests upon the "*unique legal status* of Indian tribes under federal law and upon the plenary power of Congress, based on * * * the assumption of a 'guardian-ward' status, *to legislate on behalf of* federally recognized Indian tribes." *Id.* at 551 (emphases added); *see id.* at

555. Thus, while he talks about "Indian tribes," petitioner in fact grounds his effort to distinguish *Mancari* on the propositions that—unlike Indian tribes—indigenous Hawaiians do not enjoy a "special relationship" with the United States, and that Congress lacks the authority to treat them accordingly. *See* Br. 39-44.

But, as discussed, Congress is constitutionally empowered to deal with Hawaiians, has recognized such a "special relationship," and—"[i]n recognition of th[at] special relationship"—"has extended to Native Hawaiians the *same* rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 20 U.S.C. § 7902(13) (emphasis added). As such, Congress has established with Hawaiians the same type of "unique legal relationship" that exists with respect to the Indian tribes who enjoy the "same rights and privileges" accorded Hawaiians under these laws. 42 U.S.C. § 11701(19). That unique legal or political status—not recognition of "tribal" status, under the latest executive transmutation of what that means—is the touchstone for application of *Mancari* when, as here, Congress is constitutionally empowered to treat an indigenous group as such.[11]

This reading of *Mancari* comports with the fact that for most of our history "tribal" status has been an indeterminate concept marshaled by the executive branch, *see* Cohen, *supra,* at 3, and, thus, is a poor proxy for determining whether *Congress* may legislate with respect to a particular indigenous group. It also takes into account that Congress has historically exercised its Indian affairs power

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[11] That Congress granted indigenous Hawaiians citizenship and subjected them to the same laws as other citizens does not alter the unique legal and political status that Hawaiians occupy under federal law. Congress treated Alaska Natives in a similar fashion, *see Metlakatla Indian Community* v. *Egan,* 369 U.S. at 51, and "the extension of citizen status to Indians does not, in itself, end the powers given to Congress to deal with them." *United States* v. *John,* 437 U.S. 634, 653-654 (1978).

over indigenous people not organized into tribes in an anthropological sense, not recognized as tribes under then-prevailing definitions, or whose tribal status had been terminated—and this Court has upheld that exercise of authority. Thus, for most of our history (until 1993), most Alaska Native Villages were not recognized by BIA as "Indian tribes," *see Hynes* v. *Grimes Packing Co.*, 337 U.S. 86, 110 n.32 (1949) ("Indian tribes do not exist in Alaska in the same sense as in [the] continental United States.") (quotation omitted); yet this Court has never questioned Congress' authority to single out and deal with Alaska Natives as such. *See, e.g., Native Village of Venetie*, 522 U.S. at 523-524 (discussing ANCSA); *see generally* David S. Case, *Alaska Natives and American Laws* 195-222 (1984) (discussing federal programs for Alaska Natives).

The same goes for Congress' efforts with respect to Pueblos. In *United States* v. *Joseph*, 94 U.S. 614, 617 (1876), the Court held that "pueblo Indians, if, indeed, they can be called Indians," could *not* "be classed with the Indian tribes for whom the intercourse acts were made." In *United States* v. *Sandoval*, 231 U.S. 28 (1913), the Court was confronted with the argument that Congress therefore lacked the authority to deal with Pueblos as Indians or tribes. The *Sandoval* Court recognized that Pueblos were different from other Indians—they were citizens, held title to their lands, and lived in "separate and isolated communities." *Id.* at 39, 47-48. But "[b]e this as it may," Pueblos "have been regarded and treated by the United States as requiring special consideration and protection, like other Indian communities." *Id.* at 39. And—as long as it "cannot be said to be arbitrary"—Congress' assertion of such a "guardianship" "must be regarded as both authorized and controlling." *Id.* at 47.[12]

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[12] This Court subsequently held that Pueblos are "plainly within [the] spirit" and "fairly within [the] words" of a statute addressed to "any tribe of Indians." *United States* v. *Candelaria*, 271 U.S. at 441 (quotation omitted). But *Sandoval* establishes that Congress' rational decision to enter into a special trust relationship with a distinct indigenous people—not merely recognizing or labeling such people a "tribe"—is the touchstone for invoking Congress' broad authority over Indian affairs.

So too here, indigenous Hawaiians may be different in certain respects from other "Indians" or "Indian communities," but Congress has repeatedly singled Hawaiians out for the same type of special treatment accorded other Native Americans—including Indian tribes. Indeed, this case is easier than *Sandoval* in that Congress has not only "regarded and treated [Hawaiians] as requiring special consideration and protection, like other Indian communities," *id.* at 39, but has expressly recognized a special trust relationship with Hawaiians. *See supra* at 27-28. Because the decision to treat Hawaiians as such "cannot be said to be arbitrary," the assertion of such a "guardianship" should "be regarded as both authorized and controlling." *Id.* at 47. This Court has never disturbed such a congressional determination.

Delaware Tribal Business Committee v. *Weeks*, 430 U.S. 73 (1977), and *United States* v. *John*, *supra*, also belie petitioner's crabbed reading of *Mancari*. *Weeks* involved a challenge to a federal law providing for the distribution of certain funds to Delaware Indians and their descendants. Applying *Mancari*, the Court held that although one of the groups of Indian-descendant beneficiaries was "not a recognized tribal entity, but * * * simply individual Indians with no vested rights in any tribal property," Congress' extension of benefits to those individuals was nevertheless authorized by its "unique obligation toward the Indians." 430 U.S. at 85 (quotation omitted); *see id.* at 86.

Similarly, in *John* the Court affirmed Congress' power to subject Indians remaining in Mississippi to different criminal laws—even if they did not belong to tribes.

"Neither the fact that [the Indians] are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." 437 U.S. at 653. Nor did the fact that the Executive had previously taken the position that the Indians could not "be regarded as a tribe." *Id.* at 650 n.20. *See also United States* v. *McGowan*, 302 U.S. at 537 (Congress' authority to single out Indians for special treatment extends to "colony" established for Indians previously "scattered" about Nevada lacking any independent tribal status).

To the extent petitioner seeks to link tribal status with the right to self-governance under BIA rules (*see* Br. 40-41), his effort to dodge *Mancari* should also be rejected. Congress has recognized that the United States was complicit in "the deprivation of the rights of Native Hawaiians to self-determination." 107 Stat. at 1513. There is no reason for this Court to compound that injury by holding that one of its consequences is that Hawaiians cannot benefit from the special relationship extended to all other indigenous people. That is especially true given that one of the very purposes of OHA—and the challenged voting provision—is to afford Hawaiians a measure of self-governance. *See supra* at 9-10.[13]

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[13] It is Congress' recognition of a special relationship with an indigenous people—not any particulars of tribal status—that controls. As noted, Congress may terminate a group's tribal status when it sees fit, *see supra* at 23, and when it does so, it may sever the special relationship with that people entirely or it may do so "gradually," eliminating some but not all attributes of the special relationship. *Chippewa Indians of Minnesota* v. *United States*, 307 U.S. 1, 4 (1939). Thus, Congress may deal with "Indians upon a tribal basis," even after their "tribal relation[s] ha[ve] been dissolved," when "Congress d[oes] not intend to surrender its guardianship over the Indians." *Id.* The *Weeks* case is to the same effect. So too, in a broader sense, is Congress' approach to Alaska Natives. In ANCSA Congress gave Alaska Natives fee ownership over certain aboriginal lands—rather than subjecting such lands to the federal superintendence that denotes "Indian country"—but Congress has continued the federal guardianship over Alaska Natives in other respects. *See Native Village of Venetie*, 522 U.S. at 533-534. In Hawaii Congress has recognized that the once-sovereign Hawaiians were deprived of their right to self-determination, and has decided that they should remain subject to a special relationship with the United States.

The Constitution, in short, gives Congress room to deal with the particular problems posed by the indigenous people of Hawaii and, at least when legislation is in furtherance of the obligation Congress has assumed to those people, that legislation is no more racial in nature than legislation attempting to honor the federal trust responsibility to any other indigenous people. It is, in sum, "not racial at all." *Regents of Univ. of Cal.* v. *Bakke*, 438 U.S. 265, 304 n.42 (1978) (Opinion of Powell, J.) (discussing *Mancari*).

3. In a footnote (Br. 41 n.16), petitioner claims that *Mancari* cannot be applied to the law challenged in this case because it was passed by a State. But the decision on which he relies—*Washington* v. *Confederated Bands & Tribes of Yakima Indian Nation*, *supra*—cuts in favor of, not against, the State in this case. *Yakima* involved a challenge to a State law that extended the State's jurisdiction "over Indians and Indian territory within the State" for certain purposes. 439 U.S. at 465. The Yakima Nation challenged the law on the ground that it violated equal protection. This Court *rejected* the claim. While recognizing that "States do not enjoy th[e] same unique relationship with Indians," the Court made clear that States may act in the realm of Indian affairs pursuant to delegated federal authority. The challenged law in *Yakima* was "not simply another state law"; it "was enacted in response to a federal measure explicitly designed to [deal with a related Indian matter]." *Id.* at 501. Because the state law flowed from the "federal measure," the Court—invoking *Mancari*—found "untenable" the argument that the law drew a " 'suspect' " classification. *Id.*

Similarly, in *Washington* v. *Washington State Commercial Fishing Vessel Ass'n*, 443 U.S. 658 (1979), this Court summarily rejected the argument that state fishing regulations protecting federal treaty rights to the exclusion of non-Indians violated equal protection. "The simplest answer to this argument [was] that this Court has already held that these treaties confer enforceable special benefits on signatory Indian tribes, and has repeatedly held that the peculiar semisovereign and constitutionally recognized status of Indians justifies special treatment on their behalf when rationally related to the Government's 'unique obligation toward the Indians.'" *Id.* at 673 n.20 (quoting *Mancari*; citations omitted). That the challenged regulations were passed by a State did not render the Indian classification racial; rather, because the state law was an extension of the federal trust obligation, it was amenable to the same treatment under *Mancari* as federal law.

In the case of Hawaii, Congress has gone out of its way not only to delegate to the State responsibility to administer the federal trust for indigenous Hawaiians, but to reaffirm the State's efforts to administer that trust. When Congress obligated Hawaii to hold lands in trust for the "betterment" of its indigenous people as a condition of statehood, Congress expressly delegated to Hawaii the authority to administer the federal trust "in such a manner as the constitution and laws of the * * * State may provide." Statehood Act, § 5(f). Hawaii accepted that responsibility and—reaffirming this "solemn trust obligation and responsibility"—established OHA, the unchallenged trusts, and the voting provision at issue. Haw. Rev. Stat. § 10-1(a). This trust structure—right down to the provision giving indigenous Hawaiians the right to select who should run the trusts—flows from the federal delegation, promotes the federal trust relationship, and complements the federal role.

Congress is obviously aware of and has ratified the State's efforts to administer the federal trust. Thus, Congress has expressly recognized that the "constitution and statutes of the State of Hawaii * * * acknowledge the distinct land rights of the Native Hawaiian people as beneficiaries of the public lands trust." 42 U.S.C. § 11701(3); *see* 20 U.S.C. § 7902(21). In addition, Congress has repeatedly recognized and appropriated federal monies to OHA—the "Native Hawaiian organization" that was "established by the constitution of the State of Hawaii," "serves and represents the interests of Native Hawaiians," and "has as a primary and stated purpose the provision of services to Native Hawaiians." 25 U.S.C. § 3001(11), (12). *See supra* at 11. Evidence of the federal approval of Hawaii's efforts to honor its delegated federal trust responsibilities—including through OHA—is abundant, and resolves any *Yakima* issue here.[14]

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[14] Petitioner argues that the State has improperly expanded the federal trust by extending benefits to all indigenous Hawaiians. Since the 1970s, Congress has repeatedly defined Native Hawaiian to include "*any* individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in * * * Hawaii." 16 U.S.C. § 470w(17) (emphasis added); *see* note 4, *supra*. In establishing OHA, the definition of "Hawaiian" was added to bring state law "in line with" this federal definition. J.A. 46 (Comm. Rep. No. 59). And Congress' repeated use of the broader definition thereafter establishes its ratification of the definition used by OHA. *See Bragdon* v. *Abbott*, 118 S. Ct. at 2208.

In any event, this argument is beside the point for present purposes. Petitioner's claim that the challenged classification is unconstitutionally race-based would be no different if the electorate were limited to Native Hawaiians as defined in the HHCA. And petitioner, who is not an indigenous Hawaiian, lacks standing to object that the trusts should be administered to benefit only a subgroup of such Hawaiians. *See, e.g., Whitmore* v. *Arkansas*, 495 U.S. 149, 155 (1990) (to meet Article III standing requirement, plaintiff "must allege an injury to *himself*") (emphasis added); *Diamond* v. *Charles*, 476 U.S. 54, 62 (1986) ("The exercise of judicial power * * * can so profoundly affect the lives, liberty, and property of those to whom it extends, that the decision to seek

Congress has taken a different approach to Native affairs in the lower 48 States, Alaska, and Hawaii, due to the unique circumstances presented by each. The Framers gave Congress—not this Court—the prerogative to decide what policy to pursue in addressing the situation of the indigenous people in each of these geographic and historical categories. *See United States* v. *Hellard*, 322 U.S. 363, 367 (1944) ("Since the power of Congress over Indian affairs is plenary, it may waive or withdraw these duties of guardianship or entrust them to such agency—state or federal—as it chooses."). This Court should respect the role that Congress carved out for the State in dealing with indigenous Hawaiians.

C. Even If Indigenous Hawaiians Could Be Singled Out For "Second-Class" Treatment Under The Settled Regime, The Challenged Law Is Based On Time And Place, Not Race.

Even if the challenged law were not analyzed like every other classification addressed to an indigenous people subject to a congressionally recognized trust relationship with the United States, it would still not be suspect because it is drawn in terms of time and place—not race.

The plain language of the Hawaii statute makes clear that the term "Hawaiian" is not used in any racial sense. It covers "any" descendant of the aboriginal people of a particular place and time—the Hawaiian Islands prior to 1778—of *whatever* race. Haw. Rev. Stat. § 10-2. Nothing about the classification makes race a necessary, sufficient, or even pertinent factor. And, as a logical and practical matter, it is not. According to petitioner, Hawaii "was not 'racially pure' even before 1778." Br. 25 n.9.[15]

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review must be placed in the hands of those who have a direct stake in the outcome.") (quotations and citations omitted).

[15] Based on archeological and linguistic clues, some scholars have theorized that in 1778 Hawaiians comprised different ethnic if not racial groups, derived from successive migratory waves. *See* Patrick Kirch, *Feathered Gods and Fishhooks* 64-66, 259 (1985) (concluding that different groups of Marquesans and Tahitians migrated to Hawaii); *cf.* Peter Bellwood, *Man's Conquest of the Pacific* 325, 354 (1979) (discussing migration from Marquesan Islands); 1 Kuykendall, *supra*, at 3 (Tahiti); Heyerdahl, *supra*, at 161-168 (Pacific Northwest).

Polynesians who did not inhabit the Islands in 1778 but are probably of the same "racial" group as most if not all Islanders in 1778—*e.g.*, Tongans, Samoans, Tahitians, and Maoris—are excluded from the classification. And "Hawaiians" covered by the classification today could be characterized in terms of many different races.

In this regard, this case is not at all like the "grandfather clause" cases relied upon by petitioner (Br. 15-16), or the demagogic analogies drawn by petitioner to the "miscegenation" and "Nuremberg" laws (*id.* 24 n.8, 28 n.11). Simply reading the statute shows that the classification is not expressly racial, and the subterfuge cases do not apply because the restriction is in no sense a proxy for race. The statute reflects on its face the classification sought to be drawn—it gives the franchise to the indigenous people of Hawaii, of whatever race. There is nothing circuitous about that.[16]

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[16] Even if all those who met the statutory definition *were* of the same race, it would not mean that the classification is itself racial, or a subterfuge for a racial classification. *Mancari* makes that clear, insofar as it recognizes that legislation addressed to "racial" groups of indigenous people is not race-based. 417 U.S. at 553 n.24. *See also, e.g., Personnel Adm'r of Mass.* v. *Feeney*, 442 U.S. 256 (1979); *Hernandez* v. *New York*, 500 U.S. 352, 375 (1991) (O'Connor, J., concurring in judgment) ("No matter how closely tied or significantly correlated to race the explanation for [a governmental action] may be, the [action] does not implicate the Equal Protection Clause *unless it is based on race.*") (emphasis added). In addition, this Court has repeatedly held that a "racially discriminatory motivation is a necessary ingredient of a Fifteenth Amendment violation." *City of Mobile* v. *Bolden*, 446 U.S. 55, 62 (1980). The challenged classification here was not motivated by any "racially discriminatory" design.

Petitioner makes much of the challenged classification's reliance on the year 1778, in accordance with the congressional definition of indigenous Hawaiians. *See* note 4, *supra*. That date was chosen to fix the aboriginal and indigenous *status* of the covered people, not—as petitioner surmises—to ensure "racial purity." Br. 25. Regardless of their race, the people who inhabited the Islands in 1778 not only have the strongest but the *only* truly aboriginal claim to the Islands.

The arrival of Westerners in 1778 transformed the aboriginal Hawaiian society prior to the *coup d'état* of 1893 and the annexation of the Islands to the United States in 1898. So too, the arrival of the Dutch, English, and French transformed aboriginal societies in eastern North America prior to the formation of the United States; the arrival of the Spanish and French transformed aboriginal societies along the Mississippi, in Florida, and throughout the southwest prior to the extension of American sovereignty over those areas with the Louisiana Purchase, the Transcontinental Treaty, and the Treaty of Guadelupe Hidalgo; and the arrival of the Russians transformed aboriginal societies in Alaska prior to Seward's purchase in 1867. Nothing about these pre-United States contacts has ever been thought to preclude Congress from recognizing the indigenous people of each of these areas as such, to the exclusion of non-indigenous, pre-United States arrivals to these same lands. There is no reason to treat the Hawaiian episode of basically the same story of conquest any differently.

III. THE FIFTEENTH AMENDMENT DOES NOT GUARANTEE PETITIONER A SAY IN WHO SHOULD ADMINISTER THE UNCHALLENGED TRUSTS.

Petitioner's Fifteenth Amendment claim fails for another reason. As the Court of Appeals put it, the selection of OHA trustees "isn't a general election for government officials performing government functions of the sort that has previously triggered Fifteenth Amendment analysis." Pet. App. 15a. Citing *Terry* v. *Adams*, 345 U.S. 461 (1953), petitioner insists that the Fifteenth Amendment applies to OHA elections. Br. 19. But *Terry* itself makes clear that the Amendment only covers "election[s] in which public issues are decided or public officials selected." 345 U.S. at 468. OHA elections do not decide "public issues," and OHA trustees are not "public officials" in any traditional sense.

Public officials owe a fiduciary duty to the general public. *See, e.g., United States* v. *Lopez-Lukis*, 102 F.3d 1164, 1169 (11th Cir. 1997) ("Elected officials generally owe a fiduciary duty to the electorate."). OHA trustees, by contrast, are statutorily obligated to "act as a trustee as provided by law" for a limited class of beneficiaries—Hawaiians. Haw. Rev. Stat. § 10-5(5). Under settled law, a trustee "bears an unwavering duty of complete loyalty to the beneficiary of [a] trust, to the exclusion of the interests of all other parties." *Amax Coal*, 453 U.S. at 329. *See Ahuna* v. *Department of Hawaiian Home Lands*, 640 P.2d at 1169 ("One specific trust duty is the obligation to administer the trust *solely* in the interest of the beneficiary") (emphasis added). The State recognized this duty in deciding to limit the franchise to beneficiaries. *See supra* at 9-10.

The conclusion that the Fifteenth Amendment does not cover this—or every—election squares with the Amendment's text. By its terms, the Fifteenth Amendment ap-

plies only where the "right * * * to vote" has been infringed on account of a specified factor. U.S. Const. amend. XV, § 1. "The Fifteenth Amendment does not confer the right of suffrage upon any one." *United States* v. *Reese*, 92 U.S. 214, 217 (1875). This Court has recognized that voting is a fundamental right protected by the Fourteenth Amendment. *See Reynolds* v. *Sims*, 377 U.S. 533, 562 (1964). Yet the Court has held that citizens may be excluded under the Fourteenth Amendment from special purpose elections in which they do not have a direct interest. As the courts below recognized, OHA elections bear all the hallmarks of the type of election that this Court has held need not be open to all. There is no reason for this Court to hold here that the "right to vote" is any broader under the Fifteenth Amendment than the Fourteenth.

In a line of cases beginning with *Salyer Land Co.* v. *Tulare Lake Basin Water Storage District, supra*, this Court has held that the Fourteenth Amendment permits States and local governments to limit the franchise in elections for special or limited purposes units of government lacking general governmental powers, whose activities disproportionately affect those entitled to vote. *See Salyer*, 410 U.S. at 728; *Associated Enters., Inc.* v. *Toltec Watershed Improvement Dist.*, 410 U.S. 743, 744 (1973); *Ball* v. *James*, 451 U.S. 355, 370 (1981). OHA elections fall squarely in this category.

OHA does not exercise general governmental powers. Pet. App. 11a-12a, 42a-43a. It is a quasi-independent, "self-governing corporate body." *Trustees of Office of Hawaiian Affairs* v. *Yamasaki*, 737 P.2d 446, 452 (Haw.), *cert. denied*, 484 U.S. 898 (1987); *see* Haw. Rev. Stat. § 10-4. It does not provide services to the general public. Rather, its sole purpose—indeed, its *raison d'être*—is to benefit "Hawaiians," *see* Haw. Const. art. XII, § 6; Haw. Rev. Stat. §§ 10-1(a), 10-3, the people

in whose sole interest OHA trustees are duty bound to act. Its statutory duties and powers are tailored to that special mission. *See supra* at 9-10; Haw. Rev. Stat. §§ 10-4, 10-5, 10-6.

In *Salyer* this Court concluded that a district—"although vested with some typical governmental powers"—did not exercise " 'normal governmental authority' " where it did not provide "general public services such as schools, housing, transportation, utilities, [or] roads." 410 U.S. at 728-729. Similarly, in *Ball* the Court held that a district did not exercise general governmental powers where it could not "impose ad valorem property or sales taxes," "enact any laws governing the conduct of citizens," or "administer such normal functions of government such as the maintenance of streets, the operation of schools, or sanitation, health or welfare services." 451 U.S. at 366. The same goes for OHA, which does not exercise any such powers either.[17]

Indeed, OHA cannot even exercise governmental powers that the special purpose entities in *Salyer* and *Ball* possessed. The district in *Salyer* could condemn private property, *see* 410 U.S. 728 n.7, and the district in *Ball* not only possessed that power but the power to levy certain property taxes as well. *See* 451 U.S. at 360 & 366

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[17] Petitioner contends that OHA provides "extensive" services and therefore exercises the sorts of governmental powers that require statewide elections. Br. 21-22. This is wrong both factually and legally. OHA "generally does not provide direct services but supports groups and agencies that do." J.A. 30 (OHA home page). To the extent OHA provides any services directly to beneficiaries, they merely supplement the far more extensive services provided by the State and local governments to the general public. *See, e.g., Kessler* v. *Grand Cent. Dist. Management Ass'n*, 158 F.3d 92, 105 (2d Cir. 1998) (district did not exercise general governmental powers where its provision of sanitation, security, and social services supplemented the city's more extensive provision of such services). In this respect, OHA functions more like a private charitable organization than a public agency. *See id.*

n.11; *see also Toltec*, 410 U.S. at 744 (district possessed power to levy property taxes). Although such powers are "typical governmental powers," *Salyer*, 410 U.S. at 728, the Court nevertheless concluded in both cases that the districts did *not* exercise general governmental powers triggering the Fourteenth Amendment. OHA—by contrast—cannot exercise *any* of these powers. Moreover, quite unlike the districts in *Salyer* and *Ball*, it is impressed with a trust duty to act solely on behalf of a narrow class of beneficiaries.

OHA activities also plainly have a disproportionate effect on those entitled to select trustees—Hawaiians. Its principal function is to administer the trusts of which Hawaiians are the sole beneficiaries. All funds disbursed by OHA are spent for the benefit of Hawaiians. To the extent OHA directly provides social services, they are rendered exclusively to Hawaiians. OHA does not provide *any* services to the general public. All the trustees' statutory duties and fiduciary responsibilities run exclusively to Hawaiians, and every power granted to OHA reflects the narrow purpose for which the office was created.

In *Salyer* and *Ball*, this Court held that the activities of the districts at issue disproportionately affected landowners—the only persons entitled to vote in those cases—even though in each case the Court acknowledged that nonlandowners were affected in some measure by the districts' operations. *See Salyer*, 410 U.S. at 730-732; *Ball*, 451 U.S. at 368-371. This case is even easier than *Salyer* and *Ball* because non-Hawaiians have virtually no interest in OHA's activities.

Petitioner makes much of the fact that OHA receives some general tax revenues and that it administers certain proceeds from the § 5(f) trust, arguing that as a result non-Hawaiians have an interest in OHA's management of those funds. Br. 20-21. But as this Court emphasized in *Ball*, "[t]he *Salyer* opinion did not say that the selected

class of voters for a special public entity must be the *only* parties at all affected by the operations of the entity. Rather, the question was whether the effect of the entity's operations on them was *disproportionately* greater than the effect on those seeking the vote." 451 U.S. at 371 (emphasis added). That is clearly the case here.

Moreover, the decision to appropriate funds from general tax revenues and the § 5(f) trust is not made by OHA; it is made by the state legislature in which non-Hawaiians (including petitioner) are directly represented. *See* Haw. Rev. Stat. §§ 10-13.3, -13.5. In addition, all state residents—indigenous or not—had a say in creating OHA in the first place. *See Ball*, 451 U.S. at 371 n.20 (appellees were "qualified voters * * * and so remain[ed] equal participants in the election of the state legislators who created and [had] the power to change the District"); *Toltec*, 410 U.S. at 744.

None of this is to say that the State's ability to limit the franchise in OHA elections means that the State may exclude petitioner or anyone else on the basis of race or other suspect characteristic. But it does change the nature of petitioner's claim. Only those classifications that deny a constitutional "right to vote," or otherwise restrict access to an election meeting the *Terry* test, trigger the Fifteenth Amendment. Other classifications remain subject to equal protection review,[18] but, as we explain next, the challenged classification here survives such review.

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[18] *Quinn* v. *Millsap*, 491 U.S. 95 (1989), relied on by petitioner (Br. 20), is in accord. There, the Court overturned a state court decision holding that an election within the *Salyer* exception was not subject to equal protection analysis. In doing so, the Court did not suggest—as petitioner would have it—that the *Salyer* exception cannot apply to race-based voting restrictions, but merely observed that "[t]he rationale of the Missouri Supreme Court's contrary decision would render the Equal Protection Clause inapplicable even to a requirement that all members of the board be

IV. NO MATTER WHAT SCRUTINY IS APPLIED, THE CHALLENGED CLASSIFICATION PASSES CONSTITUTIONAL MUSTER.

The challenged classification passes muster regardless of what scrutiny is applied. In reviewing classifications—including those drawn by state law, *see supra* at 35-38—based on a group's congressionally recognized trust relationship with the United States, this Court looks to whether the provision is "tied rationally to the fulfillment of Congress' unique obligation toward Indians." *Mancari*, 417 U.S. at 555. That inquiry is different from ordinary rationality review, which requires the courts to uphold a law "if there is *any* reasonably conceivable state of facts that could provide a rational basis for the classification." *Heller* v. *Doe*, 509 U.S. 312, 320 (1993) (quotation omitted; emphasis added). The challenged voting provision in this case easily meets the *Mancari* threshold, and neither petitioner nor his amici seriously contend otherwise.

It is undisputed that OHA and the unchallenged trusts were established to further the federal trust obligation to Hawaiians, which Congress has recognized and delegated authority to the State to administer. *See* J.A. 19 (OHA was created in "recognition of Hawaiians as the natives of these islands, entitled to the special legal and political considerations given indigenous people") (OHA home page). OHA exists to promote this special relationship, and the challenged voting provision is designed to "mak[e] [OHA] more responsive to the needs of its constituents" by ensuring "participation by the governed in the governing agency," and thus "further the cause of Hawaiian self-government." J.A. 54 (Comm. Rep. No. 13). The challenged employment preference in *Mancari* advanced the

white males." *Id.* at 106. Thus, *Quinn* simply holds that any voting restriction—like any other governmental classification—remains subject to equal protection review.

same interest. *See* 417 U.S. at 554 (provision "ma[de] the BIA more responsive to the needs of the constituent groups," and ensured "participation by the governed in the governing agency"); *id.* at 542. The provision here also ensures proper administration of the assets held and managed on behalf of Hawaiians.[19]

That should be the end of the matter. But even if the challenged classification were subject to strict scrutiny, it would still survive. Petitioner and his amici argue that the classification singling out indigenous Hawaiians could not possibly meet such scrutiny, relying principally on this Court's affirmative action precedents. *See* Pet. Br. 29-30. None of those cases, however, involved laws singling out an indigenous people subject to a congressionally recognized trust relationship. Neither this Court nor any other has ever applied strict scrutiny to such a classification. In any event, as this Court observed in the affirmative action case on which petitioner most heavily relies, "strict scrutiny is strict in theory, but not fatal in fact." *Adarand*, 515 U.S. at 237 (quotation omitted). It is not fatal here.

As the Court of Appeals held below, "the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust [relationship], and the restriction on voter eligibility is precisely tailored to the perceived value that a board 'chosen from among

[19] Although petitioner suggests (Br. 45) that *Mancari* cannot be applied to "voting laws," nothing in *Mancari* or its progeny supports this result-oriented conclusion. Application of *Mancari* does not depend on the type of law challenged, but rather whether the law is "tied rationally to the fulfillment of Congress' unique obligation toward Indians." 417 U.S. at 555. As a matter of self-governance, not to mention strengthening the fiduciary duty to an indigenous people, Congress may—and has—passed laws limiting the franchise based on indigenous status. *See supra* at 22. Indeed, under petitioner's view, every Native or tribal election would have to be opened to all, a proposition that would radically alter the existing governance of Native affairs.

those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles.'" Pet. App. 17a (quoting Comm. Report No. 59). Moreover, "[g]iven the fact that only [indigenous Hawaiians] are trust beneficiaries, there is no race-neutral way to accord only those who have a legal interest in management of trust assets a say in electing trustees except to do so according to the statutory definition * * * which makes the beneficiaries the same as the voters." *Id.* at 18a.

Petitioner argues that "[t]his Court has never held that [furthering a] legislatively declared 'trust' relationship suffices" as a compelling state interest. Br. 31. But the Court simply has never considered the issue. One need only review the seminal Indian law decisions discussed in Part II.A, *supra*—including *Worcester*—to appreciate the gravity of this interest to a Nation that strives to be "Great." *FPC* v. *Tuscarora Indian Nation*, 362 U.S. 99, 142 (1960) (Black, J., dissenting). *See also Williams*, 115 F.3d at 665 n.8 ("We have little doubt that the government has compelling interests when it comes to dealing with Indians. In fact, *Mancari*'s lenient standard may reflect the Court's instinct that *most laws favoring Indians serve compelling interests.*") (emphasis added).

The challenged classification here not only promotes the compelling state interest in honoring the special trust relationship with indigenous Hawaiians, it—along with OHA and the unchallenged trusts—addresses the congressionally recognized wrongs that were inflicted upon those people by the United States. *See* Apology Bill, 107 Stat. at 1511-13. The State's efforts—acting pursuant to delegated federal trust responsibility—to "do for the descendants of [indigenous Hawaiians] what in the conditions of this twentieth century is the decent thing," *Northwestern Bands of Shoshone Indians*, 324 U.S. at 355

(Jackson, J., concurring), provide another compelling state interest.

The challenged classification is narrowly tailored to serve these compelling interests. As discussed, it is drawn perfectly to capture indigenous Hawaiians—the "distinct and indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago whose society was organized as a Nation prior to the arrival of the first nonindigenous people in 1778." 42 U.S.C. § 11701(1); *see supra* at 38-40. That is the same classification Congress uses in legislating on behalf of the indigenous people of Hawaii. *See* note 4, *supra*. There is simply no practical way to define the classification differently to capture indigenous Hawaiians.

Moreover, it is difficult to conceive of a better way to ensure that OHA acts in the best interests of the beneficaries of the trust relationship—Hawaiians—than to give Hawaiians the final say in who administers the trusts. Indeed, as the Court of Appeals explained, the challenged classification is "precisely tailored" to ensure "proper management and adherence to the needed fiduciary principles." Pet. App. 17a (quotation omitted). Opening up the election (or the unchallenged trusts) to non-beneficiaries not only would fail to serve the compelling interests in promoting the federal trust relationship with Hawaiians and redressing wrongs inflicted upon Hawaiians, it would create a conflict of interest and possible breach of fiduciary duty on the part of trsutees, who, appropriately so, are duty bound under state law to act in the best interests of Hawaiians.

Accordingly, even if this Court concludes that the challenged classification is race-based, the Constitution does not prevent the State—or, for that matter, the United States—from drawing it in seeking to further the Nation's special obligation to indigenous Hawaiians.

* * * *

Petitioner and his amici ask this Court to subject indigenous Hawaiians to a legal regime that not only is entirely different from the one that has for centuries been used to analyze legislation dealing with America's other indigenous people, but would be entirely foreign to the Framers of the Constitution and the Civil War Amendments. Neither this Court's affirmative action precedents, the "painful lessons taught by the Civil War," Pet. Br. 50, nor the result-oriented distinctions petitioner asks this Court to draw between the indigenous people of Hawaii and the indigenous people of the rest of the United States support this unequal and unjust result. The challenged voting provision is not race-based under the regime that has always been applied to legislation singling out indigenous people subject to a special trust relationship with the United States, and accordingly does not violate either the Fifteenth or Fourteenth Amendments.

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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IN THE
Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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INTRODUCTION

As the court below explicitly held, Hawaii has adopted voting restrictions that contain "a racial classification on their face." Pet. App. 11a. Those restrictions prevent petitioner and many other citizens of Hawaii from voting for state officials in certain statewide elections, solely because they have the wrong ancestors and the wrong blood in their veins.

This Court has repeatedly emphasized that government's use of racial classifications is uniquely harmful, and that the injury from such classifications radiates outward into society, creating further problems of stigma, resentment and racial politics. The use of race is absolutely forbidden under the Fifteenth Amendment; and under the Fourteenth Amendment, the Court has strictly reserved the permissible use of race to the rarest and most extreme of circumstances, precisely because race is such a destructive basis for government action. A state actor, even one motivated by an ostensibly benign intent, must demonstrate that a racial classification is necessary to serve a truly compelling governmental purpose, and the classification chosen must be tightly tied to that compelling purpose. Hawaii's racial voting restrictions embody the perils and pernicious consequences of racial classifications, and the "justifications" offered are irrational, attenuated and far removed from the facts that provide the purported rationalization for the discrimination. There is no close fit between the means chosen—racial segregation at the polls—and the various ends respondent identifies. Hawaii's laws thus plainly violate both the Fifteenth and the Fourteenth Amendments.

In an effort to avoid this inescapable conclusion, respondent attempts to redefine Hawaii's voting restriction as *not* racial but "political," because it benefits descendants of an "aboriginal" or "indigenous" race. But respondent's effort at repackaging cannot conceal the simple and unavoidable fact that the right to vote in

Hawaii is conditioned on genetics. There is no exception in the Constitution's text or this Court's jurisprudence for race discrimination based upon descent from an "indigenous" ancestor. Nor is respondent correct to suggest that a ruling in petitioner's favor would automatically invalidate scores of federal statutes. *E.g.*, Resp. Br. 14. Hawaii's racial voting laws are unique, and are the only laws at issue here.

I. HAWAII RESTRICTS VOTING ON RACIAL, NOT POLITICAL, GROUNDS

The central premise of respondent's argument—under both the Fifteenth and Fourteenth Amendments—is that Hawaii's voting restrictions are not racial but "political." Respondent asks this Court to rule that Congress's power to legislate with respect to "Indian Tribes" extends to all descendants of every "indigenous" race, even clusters of persons who share common ethnic ancestors but lack political or social separateness, internal governmental structures, or any of the other attributes of retained sovereignty. Respondent also contends that Congress has delegated to Hawaii the power to make these racial classifications.

Respondent is doubly wrong. The Constitution and this Court's decisions establish that the United States' special relationship with Indian Tribes is based on the quasi-sovereign political status of those Tribes, not on fashionable theories regarding "indigenous" races. Moreover, whatever the outer limits of Congress's power, Congress has not purported to give Hawaii the authority to enact the racial voting laws challenged here.

A. Hawaii's Voting Restriction Is Race-Based

Respondent's initial claim that the word "race" is "not found anywhere" in the OHA election laws is a sophism. Resp. Br. 1. Hawaii restricts the OHA electorate to "any descendant of the aboriginal *peoples* inhabiting the Hawaiian Islands which exercised sover-

eignty . . . in 1778." Haw. Rev. Stat. § 10-2 (emphasis added). The word "peoples" is, of course, synonymous with "races" in this context. *E.g.*, Resp. Br. 24 ("this Court ha[s] often referred to indigenous people . . . in terms of race"). But even if that were not sufficiently obvious, when Hawaii's legislature substituted the word "peoples" for "races," its intent to discriminate based on race remained explicit: "Your Committee wishes to stress that this change is non-substantive, and that '*peoples' does mean 'races.*'" Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 (emphasis added). It is undisputed, moreover, that the 1778 date on which the definition pivots was chosen to exclude "Westerners." Resp. Br. 40; *see also* Kamehameha Schools Br. 7 (1778 is significant as the year the first "*white* foreigner" landed in Hawaii) (emphasis added).

The unavoidable fact is that Hawaii's OHA election system determines eligibility to vote on the basis of ancestry or ethnic consanguinity, *i.e.*, race.[1]

B. Respondent's Theory Of "Indian Tribes" Is Irreconcilable With The Constitution And With This Court's Precedents

Respondent concedes that the United States "never formally recognized or dealt with Hawaiians as 'Indian tribes,'" and "never entered into treaties with indigenous Hawaiians." Resp. Br. 6. Nonetheless, respondent combines unconnected dictionary definitions of the terms "Indian" and "Tribe" to create an unprecedented

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[1] The Justice Department has analyzed language substantively *identical* to that in Hawaii's statute, and concluded that it constitutes an "*express racial classification.*" S.L. 1 at 1 (Letter from Thomas M. Boyd, Acting Assistant Attorney Gen., to Hon. Augustus F. Hawkins, Chairman, House Education and Labor Comm. (Mar. 31, 1988) (emphasis added)). The documents cited "S.L." are lodged with the Clerk as a Supplemental Lodging.

and wildly expansive definition of "Indian Tribes" as any class of persons descended, however remotely, from an "indigenous" race. *Id.* 28-29. *But see United States v. Sandoval*, 231 U.S. 28 (1913); *Montoya v. United States*, 180 U.S. 261 (1901).[2] The resulting spurious "tribe" of racial Hawaiians is diffuse, lacks internal governing structures or institutions, has no separate political identity, is inconsistent with Hawaiian history and culture, and is defined solely on the basis of an ancestral relationship linked to the date a particular "white" British naval officer first arrived in the Islands. According to respondent, Congress—and by implicit delegation, Hawaii—has virtually unreviewable authority to single out such an "indigenous" racial group for special treatment, in perpetuity, free from the constraints on government action imposed by the Fifteenth and Fourteenth Amendments. This asserted power would be far greater than Congress's power to legislate with respect to any other racial group, and is wholly unsupported by the Constitution and contrary to this Court's precedents.

1. Congress's power to legislate with respect to Indian Tribes is not as sweeping or as infinitely elastic as

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[2] Respondent meticulously uses the word "peoples" in order to avoid the word "race." But as noted above, in this context the two terms both connote ancestry and mean precisely the same thing. As this Court has explained, "[d]istinctions between citizens solely because of their *ancestry* are by their very nature odious to a free people .... For that reason ... classification ... based on *race* alone has often been held to be a denial of equal protection." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943) (emphases added); *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 223-24 (1995); Opp. 20 (emphasizing "native blood").

When this Court struck down Virginia's miscegenation laws, it rejected classifications based on ancestry, including a provision that made exceptions in order "'to recognize as an integral and honored part of the white race the descendants of John Rolfe and Pocahontas ....'" *Loving v. Virginia*, 388 U.S. 1, 5 n.4 (1967).

respondent's theory demands. That power stems from two provisions of the Constitution: the Indian Commerce Clause of Article I, Section 8, which empowers Congress to regulate commerce "with Indian Tribes," and the Treaty Clause of Article II, Section 2. *Morton v. Mancari*, 417 U.S. 535, 551-52 (1974).[3]

Respondent distorts the meaning of "Indian Tribes" by divorcing the phrase from the surrounding text. The Constitution states that Congress shall have power "[t]o regulate Commerce with foreign Nations, and among the several States, and with Indian Tribes"—in each clause, the reference is to sovereign entities. U.S. Const. art. I, § 8. This Court has looked to those related clauses in interpreting the Indian Commerce Clause, precisely to avoid atextual interpretations such as respondent's. *Cherokee Nation v. Georgia*, 30 U.S. 1, 19 (1831). Respondent's reading also renders "Tribes" superfluous, because it adds nothing that simply adding an "s" to "Indian" would not also accomplish.[4]

The Treaty Clause confirms that any "special relationship" is limited to quasi-sovereign Indian Tribes. As Chief Justice Marshall stated for the Court in *Worcester v. Georgia*, 31 U.S. 515 (1832), the Constitution "has

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[3] Quoting *United States v. Kagama*, 118 U.S. 375, 384-85 (1886), the Solicitor General implies that Congress's authority stems from the "weakness" of Indian Tribes, rather than the Constitution's text. U.S. Br. 13. In *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172 n.7 (1973), however, this Court rejected *Kagama*'s reasoning as the product of "confusion," and emphasized that "the power derives from federal responsibility for regulating commerce with Indian tribes and for treaty making."

[4] Respondent's out-of-context dictionary survey is misleading and incomplete. *See, e.g.*, Bouvier, *A Law Dictionary* 492 (1839) (defining "Indian Tribe" as "a body of the aboriginal Indian race ... exercising the powers of government and sovereignty" and "a distinct political society, capable of self-government").

adopted and sanctioned the previous treaties with the Indian nations, and consequently, admits their rank among those powers who are capable of making treaties." *Id.* at 559; *see also Cherokee Nation*, 30 U.S. at 11. Respondent's theory would lead to the absurd result that the federal government could "make Treaties" with any group of two or more descendants of an "indigenous" race, regardless of whether that group retains any sovereignty or internal governmental structure, and such "Treaties" would be the "supreme Law of the Land." U.S. Const. art. VI.[5]

2. Respondent's attempt to transform an amorphous group of individuals defined by race into an "Indian Tribe" is also inconsistent with this Court's decisions.

Mancari held that "only . . . 'federally recognized' tribes" enjoy a "special relationship" with the federal government, while "'racial' group[s] consisting of 'Indians'" do not. *Mancari*, 417 U.S. at 553 n.24; *id.* at 551-52; *see also Worcester*, 31 U.S. at 556, 559; *Cherokee Nation*, 30 U.S. at 15. The *Mancari* Court, in fact, was careful to explain that "[t]he preference, as applied, is granted to Indians *not as a discrete racial group*, but, rather, *as members of quasi-sovereign tribal entities*." 417 U.S. at 554 (emphases added).

The classification at issue in *Mancari* was "political" because it defined its beneficiaries based on a political criterion: membership in a distinct quasi-sovereign polity. 417 U.S. at 554. The political quality of the classi-

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5 Respondent's novel contention that classifications based on "indigenous" races are "political" rather than "racial" also is irreconcilable with the consistent view of the Executive Branch that Indians are a "race" for purposes of the Fifteenth and Fourteenth Amendments. *See, e.g.*, S.L. 2 at 2 (Memorandum for the United States as Amicus Curiae, *Allen v. Merrell*, No. 56-534 (U.S. 1956)); S.L. 3 at 7 (Complaint, *United States v. Day County* (D.S.D. May 10, 1999)).

fication both preexisted and was independent of special treatment by Congress. Respondent cannot claim a similar political organization for distant relatives of persons living in Hawaii in 1778, and expressly disclaims that notion. *E.g.*, Opp. 18 ("The tribal concept simply has no place in the context of Hawaiian history."); Pet. Br. 40-43. The so-called "political" event on which respondent relies, European discovery, would apply to all descendants of Indians and other "indigenous" groups, regardless of political identity, and thus is inconsistent with the Constitution and *Mancari*. Respondent's argument is also inconsistent with the Justice Department's own interpretation of *Mancari*.[6]

Respondent also makes the extraordinary claim that equal treatment for all citizens of Hawaii imposes "second-class status" on racial Hawaiians. Resp. Br. 3, 27, 38. To the contrary, equality under the law and equal access to the ballot box are among this nation's

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6 The official letters cited by the Solicitor General (U.S. Br. 26-27 n.7) establish that the government's litigating position in this case contradicts the Administration's recent views. *E.g.*, U.S. Lodging, Letter from Andrew Fois, Assistant Attorney Gen., to Hon. Nancy Kassebaum, Chairwoman, Senate Comm. on Labor and Human Resources at 3 (Jan. 11, 1996) (adopting "government-to-government" interpretation of *Mancari* and concluding that "the United States has not granted Native Hawaiian organizations a status similar to that of Indian tribes" and therefore "any grants or contracts awarded under the [proposed] bills to Native Hawaiian organizations or their members probably would have to meet the *Adarand* standards, rather than those of *Morton v. Mancari*"); U.S. Lodging, Letter from L. Anthony Sutin, Acting Assistant Attorney Gen., to Hon. Ben Nighthorse Campbell, Chairman, Senate Comm. on Indian Affairs at 2 (July 16, 1998) ("Native Hawaiians have not been accorded the same status or treatment as Federally recognized Indian tribes in the continental United States."); *see also* S.L. 4 at 5 (Janet Reno, *Department of Justice Policy on Indian Sovereignty and Government-to-Government Relations with Indian Tribes* (Aug. 13, 1999)).

greatest promises. Under respondent's distorted rhetoric, this Court relegated non-tribal Indians (and all non-Indians) to "second-class status" in *Mancari*. Certainly no Member of the Court saw it that way.

Respondent next relies on three other cases to claim that the "special relationship" with federally recognized Indian Tribes applies to all descendants of "indigenous" races, regardless of their internal political organization or retained sovereignty: *United States v. Sandoval*, 231 U.S. 28 (1913), *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977), and *United States v. John*, 437 U.S. 634 (1978). Resp. Br. 32-34. These cases refute, rather than support, respondent's analysis.

Sandoval held that the Pueblo Indians were a federally recognized Indian Tribe. 231 U.S. at 46-47. Although different from more nomadic Tribes, "[t]he people of the pueblos," the Court emphasized, are "Indians in race, customs, *and domestic government*," and have "[a]lways liv[ed] in separate and isolated communities." *Id.* at 39 (emphasis added). The Court was clear that Congress's power over Indian Tribes does "*not* mea[n] . . . that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe." *Id.* at 46 (emphasis added).

Weeks involved a congressional plan to distribute an Indian Claims Commission judgment to the descendants of the Delaware Indian Tribe for a century-old treaty violation. Congress expressly *limited* the beneficiaries to those descendants who were affiliated with then-existing, federally recognized Indian Tribes. 430 U.S. at 78-82. The Court rejected equal protection claims by descendants who lacked tribal affiliation, reasoning that distinctions between tribal and non-tribal Indians were consistent with the scope of Congress's power to deal with federally recognized Indian *Tribes*, and that the Indians seeking to overturn the plan had "severed their relations with the tribe . . . to become United States citizens." *Id.* at 85-86; *see also Eastern Band of Cherokee Indians v. United States*, 117 U.S. 288, 309 (1886) (denying benefits to individual Indians who "dissolved their connection with their nation" and "have had no separate political organization since").

Respondent characterizes *Weeks* as upholding Congress's grant of benefits to a group of Indians who were "'not a recognized tribal entity, but * * * simply individual Indians with no vested rights in any tribal property.'" Resp. Br. 33 (citations omitted). But when the Court described the group as not being "a recognized tribal entity," it was referring to the group of non-tribal Indians properly *excluded* from the beneficiary class. 430 U.S. at 85. Respondent has *Weeks* exactly backward.

Both respondent and the United States also mistakenly rely on *John* for the proposition that neither internal tribal government nor federal recognition is a prerequisite to Congress's authority to recognize a "special relationship" with the descendants of an "indigenous" race. *John* involved a group of Choctaw Indians that, pursuant to an 1830 treaty with the United States, elected to remain in Mississippi rather than relocate with their Tribe to a new reservation outside the State. Although the United States did not at first regard these Mississippi Choctaws as a Tribe, Congress eventually granted them official tribal recognition. 437 U.S. at 644-46. The 1830 treaty, moreover, specifically provided that any tribal members who elected to remain in Mississippi were not to "'lose the privilege of a Choctaw citizen.'" *Id.* at 641 (citation omitted). Racial Hawaiians, by contrast, were never part of a Tribe, retained no citizenship in the Kingdom of Hawaii either at the time Hawaii was annexed by the United States or at the time it attained statehood, and hold no such right today. Pet. Br. 2-5.[7]

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[7] As in *John*, many of the cases relied upon by respondent and his amici turn on treaty or statutory rights granted to members of

Similar errors infect respondent's and the United States' reliance on *United States v. Antelope*, 430 U.S. 641 (1977). Both characterize *Antelope* as holding that federal regulation of Indian affairs, regardless of tribal affiliation, "'is not based upon impermissible [racial] classifications.'" U.S. Br. 15 (citation omitted, brackets in original); Resp. Br. 24-25. But these isolated quotations are misleading. *Antelope* declared that congressional power over Indian affairs "is rooted in the unique status of Indians as 'a separate people' with their own political institutions." 430 U.S. at 646. Federal law was applicable to the respondents, "*not* . . . because they are of the Indian race *but because they are enrolled members of the Coeur d'Alene Tribe*." *Id.* (emphases added). As respondent and the United States appear to concede, the Hawaiians selected to be eligible to vote for OHA trustees are neither "'a separate people' with their own political institutions" nor "enrolled members" of a federally recognized Indian Tribe. *Antelope* therefore refutes respondent's theory.

Respondent's voting restriction based on ancestry thus depends upon a vast, unprecedented, unjustifiable and potentially quite dangerous expansion of *Mancari*. Tens of millions of Americans have arguably "indigenous" roots—Indian, Tejano, Californio, and so on. *E.g.*, CCBA Br. 19-25; 60 Fed. Reg. 44674, 44679 (1995) (8.7 million Americans already self-identify as

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federally recognized Indian Tribes. *See, e.g., Taylor v. Brown*, 147 U.S. 640 (1893) (land allotments); *Board of County Comm'rs v. Seber*, 318 U.S. 705 (1943) (same); *Menominee Tribe v. United States*, 391 U.S. 404 (1968) (hunting and fishing rights); *Chippewa Indians v. United States*, 307 U.S. 1 (1939) (land trust proceeds). These cases do not support respondent's theory, because "the United States never entered into treaties with indigenous Hawaiians" or recognized them as a "Indian Tribes." Resp. Br. 6.

having at least one "American Indian" ancestor). Respondent would have this Court approve essentially unconstrained power to discriminate in favor of—or against—any part of that population.[8] Respondent's approach thus contains "no logical stopping point," *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 275-76 (1986), and "could be used to 'justify' race-based decisionmaking essentially limitless in scope and duration." *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 498 (1989) (opinion of O'Connor, J.). Indeed, petitioner's amici provided several examples of States with "indigenous" inhabitants who, under respondent's view, would also be subject to the "special relationship." CCBA Br. 19-25; *see also* CEO Br. 21-24; Pet. Br. 18, 35. Respondent does not even attempt to address those examples.

3. Finally, even *if* respondent's theory could be harmonized with the Constitution's text and this Court's jurisprudence, it fails for additional reasons. There has been no "express" delegation to Hawaii to make the racial classification at issue here. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463, 486 n.30, 501 (1979). No Act of Congress—not the Admission Act, not the "Apology Bill," nothing—even remotely authorizes Hawaii to discriminate on the basis of race in voting; nor could Congress constitutionally authorize such a restriction. Pet. Br. 41 n.16.

This case does not require the Court to redefine the dimensions of the federal government's relationship with Indian Tribes. Nor does it remotely warrant the Court's abandonment of its role in reviewing States' race-based

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8 *Antelope* makes clear that the "special relationship" can justify special burdens on members of Indian Tribes. 430 U.S. at 646; *see also Duro v. Reina*, 495 U.S. 676, 692 (1990) (recognizing "the Federal Government's broad authority to legislate with respect to *enrolled* Indians as a class, *whether to impose burdens or benefits*") (emphases added).

classifications, including those involving "indigenous" peoples. *Croson*, 488 U.S. at 506. If the Fifteenth and Fourteenth Amendments mean anything, they mean that the right to vote in elections for public officials may not be denied to American citizens based upon ancestry.

II. HAWAII'S RACIAL VOTING SCHEME VIOLATES THE FIFTEENTH AMENDMENT

The Fifteenth Amendment prohibits racial restrictions on the right to vote. The argument that Hawaii's voting restriction is not racial has been rebutted above. Respondent's remaining arguments would require this Court to fashion new and entirely unwarranted racial loopholes in the Fifteenth Amendment.

First, respondent contrives an argument that the racial content of the OHA election laws is a coincidence based on "time and place—not race." Resp. Br. 38. Oklahoma's racially-restrictive "Grandfather Clause" was defended on the basis of a similar "time and place" argument. This Court rejected that subterfuge in *Guinn v. United States*, 238 U.S. 347, 349-52, 358-65 (1915).

Respondent claims that racial Hawaiians, defined by reference to 1778 when a racially "pure" group supposedly inhabited the islands, deserve preferential treatment because they lost national sovereignty and public lands when the Kingdom of Hawaii fell. Resp. Br. 38-40. But there was no Kingdom of Hawaii in 1778, and the Kingdom that was formed in 1810 fell in 1893, not 1778. In 1893 the citizenry was racially diverse and had a shared interest in sovereignty and public lands. Pet. Br. 2-3, 24-27. Thus, respondent makes an untenable rhetorical connection between two dates in history, one to justify the preference (1893—the loss of sovereignty) and one to justify the racial restriction (1778—the arrival of "white foreigner[s]," Kamehameha Schools Br. 7). Respondent's bewildering "time and place" theory amounts to nothing more than a 221-year multi-generational residency requirement (*cf. Dunn v. Blumstein*, 405 U.S. 330

(1972); *Saenz v. Roe*, 119 S. Ct. 1518 (1999)), and would even provide a rationalization for limiting the electorate to "any descendant of the peoples who inhabited Great Britain prior to 1776."[9]

Second, respondent asserts that the Fifteenth Amendment does not apply to all state-wide elections because of the "special purpose" election exception to the Fourteenth Amendment's one-person, one-vote rule. Resp. Br. 41-42 (citing *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973)). This theory hinges on a new and unsupported distinction between what respondent labels "traditional" public officials (whose elections are governed by the Fifteenth Amendment) and other state officials who are "not 'public officials' in any traditional sense" (whose elections are not covered by the Amendment). Resp. Br. 41. Indeed, respondent argues that the OHA election laws satisfy the Fifteenth Amendment, even if they are race-based, precisely because the underlying OHA laws are designed to exclude non-racial Hawaiians not only from

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9 Respondent also argues the OHA election laws are not racial because they exclude non-Hawaiian Polynesians who arrived in Hawaii too late. Resp. Br. 38-39. This is no less racially discriminatory than limiting suffrage to whites but excluding those born on the mainland. Under respondent's theory, Virginia could have salvaged its miscegenation laws by discriminating against most but not all African-Americans, or by making special provisions (as it did) for the descendants of Pocahontas and John Rolfe. *Cf. Loving*, 388 U.S. at 5 n.4; note 2, *supra*. Respondent's converse sky-is-falling argument, that invalidating Hawaii's voting laws would open all tribal elections to non-members (Resp. Br. 47 n.19), is equally flawed. OHA is an organ of *state* government subject to the Fifteenth and Fourteenth Amendments; this case has nothing whatever to do with who may vote in Indian tribal elections. *Cf. Kerr-McGee Corp. v. Navajo Tribe*, 471 U.S. 195, 201 (1985).

the vote, but from any role in OHA whatever. *Id.* at 44-45.[10]

The sole authority respondent cites for this breathtaking exception to the Fifteenth Amendment is *Salyer*. But *Salyer* is not a race case, and its definition of public officials proves respondent's error. The Court in *Salyer* found that members of the board of a *county* water district elected in a "special purpose" election were public officials. 410 U.S. at 720, 724, 727-28. OHA board members, who head a *state* agency responsible for a host of government functions, including distributing funds appropriated from general tax revenues, are *a fortiori* public officials.[11] Respondent's theory thus fails under both *Salyer* and *Terry v. Adams*, 345 U.S. 461 (1953), because the Fifteenth Amendment "*bans* racial discrimination" in "*any* election in which public issues are decided or public officials selected." *Id.* at 467, 468 (emphases added). This Court has *never* approved a racially-defined "special purpose" election.[12]

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[10] The United States does not support this portion of respondent's argument; indeed, the Justice Department recently argued that exclusion of Indian voters from a county sanitary district abridges the right of Indians to vote "on account of race" in violation of the Fifteenth and Fourteenth Amendments. S.L. 3 at 7.

[11] The claim that OHA officials are not "public" conflicts with respondent's position that OHA exercises delegated congressional power and is responsible for administering the *State's* alleged trust responsibility (Resp. Br. 8-9), and also with OHA's characterization of its "broad" "public" functions. Pet. Br. 21-22; J.A. 19, 29.

[12] Respondent's and OHA's claim that OHA is somehow free to spend state tax dollars in discriminatory ways because all Hawaiians are eligible to vote for the lawmakers who fund it (Resp. Br. 45; OHA Br. 25) would permit States to discriminate at will. The bodies that enacted the laws at issue in *Croson* and *Adarand* were also elected by the general public. That did not release them from constitutional constraints.

Finally, respondent argues that once Hawaii created the OHA board as "trustees" to serve racial Hawaiians (Haw. Rev. Stat. § 10-5(5)), it had a "duty" to limit the board's electorate to trust beneficiaries. Resp. Br. 34, 41. But the Fifteenth Amendment precludes any "duty" to discriminate on the basis of race in voting.

As the Hawaiian legislature acknowledged in enacting the OHA laws, the entire public has an interest in how "public trust" proceeds are administered by state officials, regardless of who receives the expenditures. Conf. Comm. Rep. No. 77, in 1979 Sen. J., at 998 ("ultimate accountability for the trust must be to *all the people of the State*") (emphasis added); Pet. Br. 20-21. Petitioner himself has grandchildren (seventh-generation Hawaiian citizens) who qualify as OHA beneficiaries, yet Hawaii denies him (a fifth-generation Hawaiian citizen) any vote on how OHA programs are run.

Respondent's "trust" theory also fails for a host of reasons. First, it rests on a misunderstanding of trust law and *NLRB v. Amax Coal Co.*, 453 U.S. 322 (1981). According to respondent, *Amax Coal* holds that "election [of trustees by] non-beneficiaries . . . could . . . create a conflict of interest on the part of trustees" (Resp. Br. 18), and trust doctrine precludes a non-racial OHA electorate because it would undermine "proper management and adherence to the needed fiduciary principles." *Id.* at 47-48 (citation omitted). To the contrary, *Amax Coal* affirmed the propriety of *employer-* and *union*-appointed trustees jointly administering a trust for *employees*. 453 U.S. at 330, 334. And trust law permits nearly anyone to administer a trust for anyone else. Restatement (Second) of Trusts §§ 89-108, 115. Thus, even assuming *Amax Coal* and trust law are relevant, they most certainly do not establish that either trustees or those who select them must be beneficiaries of the trust. Second, by respondent's own standards the OHA board currently suffers from an impermissible "conflict of interest" because it represents two groups of racially defined Hawaiians with

inevitably conflicting claims. Pet. Br. 36-38; Hou Hawaiians Br. 9-12. Third, OHA is not a "trust" in any formal sense. In fact, it is a state agency that distributes public property and public funds to racially defined groups of individuals. That does not make it a trust.

III. HAWAII'S RACIAL VOTING SCHEME VIOLATES THE FOURTEENTH AMENDMENT

The OHA laws also violate the Fourteenth Amendment. Racial Hawaiians are not members of an Indian Tribe, which precludes rational basis review under *Mancari*. *See* Part I; Pet. Br. 39-45.[13] Accordingly, Hawaii's race restriction must satisfy strict scrutiny.[14] Respondent has never identified a "compelling interest" sufficient to support race discrimination at the polls, and cannot even begin to show that Hawaii's race-based voting is narrowly tailored to serve any such interest. Pet. Br. 28-45.

Respondent claims a compelling interest in addressing the "congressionally recognized wrongs that were inflicted upon these people by the United States." Resp.

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13 Respondent asserts that petitioner does not "seriously contend" that Hawaii's voting laws fail rational basis review. Resp. Br. 46. To the contrary, OHA's election laws are the embodiment of irrational racial stereotyping and discrimination. *E.g.*, Pet. Br. 33-35.

14 *See* S.L. 5 at 2 (Letter from Thomas M. Boyd, Assistant Attorney Gen., to Hon. Daniel K. Inouye, Chairman, Senate Select Comm. on Indian Affairs (Jan. 30, 1989) ("[P]references for Indians, however, that do not depend, even in part, upon membership in an Indian tribe, but rather depend solely upon being a person of the Indian racial group, are not justified under [*Mancari*], and accordingly must be examined under Supreme Court precedent governing the use of racial classifications.")); *see also* note 6, *supra*.

Significantly, the Solicitor General does *not* argue that the OHA election laws could meet strict scrutiny.

Br. 48 (citing "Apology Bill," 107 Stat. 1510 (1993)). The "Apology Bill," however, does not compel the United States, let alone Hawaii, to act on the basis of race. It is, as its sponsor explained, "a simple resolution of apology, to recognize the facts as they were 100 years ago." 139 Cong. Rec. S14477, 14482 (1993) (remarks of Sen. Inouye); *id.* ("Are Native Hawaiians Native Americans? *This resolution has nothing to do with that.* . . . It is a simple apology.") (emphasis added); *see also* S. Rep. No. 103-126, at 35 (1993) (bill "will not result in any changes in existing law").

Nor can respondent satisfy narrow tailoring. The State administered the funds now allocated to OHA in a race-neutral manner for two decades prior to creation of OHA in 1978. Pet. Br. 5, 32. Respondent nowhere explains why race classifications became necessary in 1978, two hundred years after the date on which they are predicated, eighty years after Hawaii became part of the United States and nineteen years after Hawaii became a State. Even if discrimination at the polls in favor of racial Hawaiians could be said to serve a compelling interest, Hawaii has also failed to narrowly tailor its voting restriction by ignoring the 50% blood quantum limitation referenced in the Admission Act. Pet. Br. 36-37.[15]

Respondent claims that "[n]either this Court nor any other has ever applied strict scrutiny" to "an indigenous people subject to a congressionally recognized trust relationship." Resp. Br. 47. Respondent is mistaken. This Court *has* applied strict scrutiny to racial preferences for Indians and Aleuts—groups which, according to respondent, are subject to such a relationship. *Croson*, 488 U.S. at 506; *Adarand*, 515 U.S. at 204-05. Thus, this Court already has decided that strict scrutiny

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15 Respondent errs in contending (Resp. Br. 37 n.14) that petitioner lacks standing to raise this fatal flaw in Hawaii's racial scheme. *See Heckler v. Mathews*, 465 U.S. 728, 737-40 (1984).

applies to preferences for "indigenous" races (as opposed to members of Indian Tribes).[16]

IV. HAWAII'S RACIAL LAWS ARE NOT PRESUMPTIVELY CONSTITUTIONAL

Respondent's defense of the Ninth Circuit's presumption of constitutionality for unchallenged racial laws fails to address this Court's precedents and misreads the chief case on which it is based. Resp. Br. 16-20.

First, respondent ignores *Miller v. Johnson*, 515 U.S. 900 (1995), which rejects the blinkered approach to judicial review embraced by the Ninth Circuit. Pet. Br. 47-49. In *Miller*, this Court applied its "presumptive skepticism of all racial classifications" to unchallenged Justice Department rulings advanced as a defense to alleged voting rights violations. 515 U.S. at 922. The Court explained that "the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Id.*

Second, respondent incorrectly asserts that "in the cases cited by petitioner the laws that this Court held were not entitled to a presumption of constitutionality had been *challenged*." Resp. Br. 19. To the contrary, the district court in *Miller* in fact had no jurisdiction to hear a challenge to the Justice Department rulings. 42 U.S.C. § 1973c. Similarly, in *Evans v. Newton*, 382 U.S. 296 (1966), and *Pennsylvania v. Board of Dirs. of City*

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16 "If the Court [in *Croson*] had considered preferences for Native Americans to be subject to rational basis review (just like, say, preferences for optometrists, as in *Williamson v. Lee Optical* . . .), then presumably it would not have mentioned them in focusing on the absence of past discrimination." Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 568 n.142 (1996).

Trusts, 353 U.S. 230 (1957), the underlying racial preferences were private and thus unchallengeable. Pet. Br. 46-47. These cases demonstrate that even when courts lack *authority* to adjudicate the constitutionality of an underlying racial preference, that preference may not be used to justify challenged race-based state action.

Respondent relies almost entirely on *Rostker v. Goldberg*, 453 U.S. 57 (1981), to justify the Ninth Circuit's presumption of constitutionality for unchallenged racial laws. Resp. Br. 17. *Rostker* is an inappropriate case through which to justify willful judicial blindness on issues of race and voting rights because it involved neither of those topics. *Rostker* gave great deference to Congress's judgments on *both* the challenged all-male registration for the draft *and* the unchallenged underlying military policy against women in combat. 453 U.S. at 64-70. Furthermore, the standard of review in *Rostker* was much less demanding than that applicable here. Because of Congress's broad power over military affairs, *Rostker* applied a deferential version of the "important government interest" test. *Id.* at 69-70. Hawaii's racial voting laws, by contrast, must be judged against the Fifteenth Amendment's absolute ban on race discrimination at the polls, and are subject to the "most stringent scrutiny [reserved] for classifications based on race or national origin" under the Fourteenth Amendment. *United States v. Virginia*, 518 U.S. 515, 532 n.6 (1996).

Petitioner has not asked this Court to invalidate the underlying racial classifications governing OHA's expenditures of funds; rather, he asks only that those racial classifications not be used as a pretext for denying him his right to vote. Respondent, not petitioner, injected those underlying classifications into this case by relying on them as an affirmative defense to petitioner's claims. Having forced the issue before the courts, respondent cannot insulate those underlying racial classifications from the skeptical treatment that all state-sponsored racial discrimination deservedly receives, nor use them to

shield Hawaii's racial voting restrictions. *See, e.g., Loving*, 388 U.S. at 11 (race classifications must be justified only by state objectives that are "independent" of race discrimination).

Respondent's suggestion that this Court must give complete deference to Hawaii's race-based preferences (Resp. Br. 19) ignores both the roots of the Civil War Amendments and this Court's consistent skepticism of race-based laws, "federal, state, or local." *Adarand*, 515 U.S. at 227. For example, in *Cooper v. Aaron*, 358 U.S. 1 (1958), this Court based its decision on unchallenged but plainly unconstitutional state racial laws, and held—in words directly applicable here—that the Fourteenth Amendment "can neither be nullified openly and directly by state . . . officers, nor nullified indirectly by them through evasive schemes." *Id.* at 16, 17.

CONCLUSION

For the foregoing reasons and those stated in petitioner's opening brief, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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September 3, 1999

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No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

SUPPLEMENTAL LODGING BY PETITIONER

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U.S. Department of Justice

Office of Legislative and Intergovernmental Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

31 MAR 1988

Honorable Augustus F. Hawkins
Chairman
Education and Labor Committee
2181 Rayburn House Office Building
Washington, D.C. 20510

Dear Chairman Hawkins:

This letter presents the views of the Department of Justice on H.R. 5, proposed legislation that would authorize numerous education grants.

Racially-Based Grants

Part E of Title VII entitled "Native Hawaiian Education Programs" would authorize education grants for the exclusive benefit of Native Hawaiians. Part E raises serious questions under the equal protection component of the fifth amendment, because it would authorize programs for the exclusive benefit of Native Hawaiians, and would define "Native Hawaiian," in pertinent part, as "any individual who is . . . a descendant of the aboriginal people, who prior to 1778, occupied and exercised sovereignty in the area that now comprises the State of Hawaii." Under the Supreme Court's cases, an express racial classification such as that found in Part E (1) may be employed only to further a compelling governmental interest and (2) must be narrowly tailored to further that interest. See Wygant v. Jackson Board of Education, 106 S.Ct. 1842, 1846 (1986) (plurality) (quoting Palmore v. Sidoti, 466 U.S. 429, 432 (1984), and Fullilove v. Klutznick, 448 U.S. 448, 480 (1980)). Part E does not further a compelling governmental interest.

First, the Supreme Court has identified rectification of prior discrimination by the governmental unit involved as the only governmental interest that is clearly sufficiently compelling to justify reliance on racial classifications. In this regard, the "Court never has held that societal discrimination alone is sufficient to justify a racial classification." Wygant, 106 S.Ct. at 1847. The section of the bill setting forth Congress' findings, however, recites important, but nonetheless only societal concerns, e.g. that Native Hawaiians score below national norms on standardized achievement tests and are underrepresented in the uppermost achievement levels. There is no evidence in Part E, or to our knowledge, elsewhere, that these conditions resulted from past governmental discrimination against Native Hawaiians, either by the State of Hawaii or the United States. Absent such evidence, there is no compelling interest that justifies the use of a racial classification. To be sure, Congress may properly seek to address the problems of those suffering from the disadvantages recited, but it must do so by racially neutral means.

Although never squarely addressed by a majority of the Court, another possible governmental interest that may be sufficiently compelling under certain circumstances to support reliance on race is diversity. Cf. Regents of the University of California v. Bakke, 438 U.S. 265 (1978). In Bakke, Justice Powell's opinion stated that the goal of achieving diversity among university students justified consideration of race as a factor in admissions, but not the use of quotas. The diversity rationale is not applicable to Part E. The bill would not merely permit race to be taken into account to admit Native Hawaiians to educational programs in which they were under-represented. Rather, the bill would establish programs for the benefit of Native Hawaiians to the exclusion of all other racial groups, thus precluding racial diversity. In this regard, the constitutionality of the proposed bill appears to be governed by Mississippi University for Women v. Hogan, 458 U.S. 718 (1982). In Hogan, the Court held that a state university's admissions policy of excluding men from its nursing school violated the equal protection clause of the fourteenth amendment. There was no showing that the state's policy could be said to remedy prior governmental discrimination against women in admissions to nursing schools. Thus, under the intermediate scrutiny employed by the Court in sex discrimination cases, no "important" state interest justified the classification. A fortiori, Part E's racial classification cannot be justified since it is subject to an even higher level of scrutiny.

We also do not believe that a racial preference can be justified on the basis of a Federal trust responsibility to Native Hawaiians, analogous to the trust obligation to Indians approved in Morton v. Mancari, 417 U.S. 535 (1974). The Senate committee report on S. 360 attempts to derive such trust responsibility from the Hawaii Statehood Act, which conveyed land to Hawaii on the condition that the land and any resulting income be used for inter alia improvement of the conditions of Native Hawaiians.

We do not believe this argument can justify a preference for education funds for Indians. Even if the Hawaii Statehood Act did justify the selective use for Native Hawaiians of certain lands and the income derived from them, that would not justify discrimination in the allocation of federal education funds. Moreover, we note that the preference approved by the Supreme Court in Morton v. Mancari involved special circumstances not present here. The Supreme Court relied upon the fact that the

employment preference for Indians in the Bureau of Indian Affairs was not racial, but tribal, and therefore was justifiable as a means of promoting Indian self-government. As the Court stated: "the legal status of the BIA is truly sui generis." Id. at 554.

For these reasons, if the bill is to be enacted, it should be redrafted to establish educational programs open to all those who score below national norms on standardized achievement tests, are disproportionately from lower socioeconomic backgrounds, etc., without reference to their race. This would constitutionally accomplish the true purpose of the bill; namely, to help those who are socially and economically disadvantaged.

Appointment of Officers of Indian Schools

Part D of Title VIII, entitled the "Native American Indian School Act," permits the "establishment or recognition of not more than five Native American Indian Schools on Indian lands to serve Indian students residing on Indian lands." Sec. 8403(a). Interested Indian tribes are to petition for authority to establish such schools from the Secretary of the Interior.

Each established school will be a separate corporation, governed by a Board of Trustees. The Board has power to formulate policy, direct the management and make bylaws and rules of the school. The Board also appoints a Superintendent who serves as the chief executive officer of the school. The composition of the Board and "the methods to be used in electing the members" are indicated in a petition from an Indian tribe to the Secretary of the Interior.

The proposed bill is not clear as to the extent to which the Indian schools operate autonomously of federal standards. Depending upon the interpretation given to this aspect of the proposed bill, it may raise questions under the Appointments Clause of the United States Constitution.[1] Officials who exercise "significant authority pursuant to the laws of the United States," Buckley v. Valeo, 424 U.S. 1, 126 (1976), must be appointed in accordance with the procedures set forth in the Appointments Clause. The schools are funded with money made available by the Secretary of the Interior. Secs. 8412(b) & 8415. While the bill appears to leave operation of the school largely to the discretion of the Board, two provisions raise doubt as to this conclusion. First, the bill permits removal of a member of the Board for "just and sufficient cause." While the bill does not indicate who may exercise removal power, nor what standards

[1] The Board of Trustees are required to serve without compensation, except for travel expenses. Members of the Board may therefore not be officers since their position does not confer emoluments. See United States v. Germaine, 99 U.S. 508, 511-12 (1878). Nonetheless, the position of School Superintendent clearly has all the requisites of an officer and would have to be appointed in accordance with the Appointments Clause.

are to be applied in exercising the power, we assume removal is conferred on the Secretary of the Interior. Second, the Secretary of Interior must develop criteria for tribal applications to establish schools and procedures for such establishment, which possibly could be used to regulate operation of the schools.

To ensure that the officials that govern the schools are not "Officers of the United States," who must be appointed in accordance with the Appointments Clause, the bill should be changed to clarify that the schools will operate autonomously.

Recruitment of Minority Teachers

Title II of H.R. 5, entitled the "Critical Skills Act," provides for the Secretary of Education to make grants to the States to strengthen the skills of teachers and the quality of instruction in mathematics and science in the elementary and secondary schools. The Act provides that funds distributed by the states to local education agencies may be used for a variety of activities, one of which is the "recruitment or retraining of minority teachers to become mathematics and science teachers." Sec. 2090(a)(2). Section 2100 also provides that state and local funds may be used for "recruitment and inservice of minority teachers."

We do not interpret these provisions to require or permit state and local agencies to use funds in a manner that confers preferences on minority teachers. Such an interpretation would create serious problems in terms of equal protection principles. See e.g. Wygant v. Jackson Board of Education, 106 S.Ct. 1842, (1986)(plurality) and Fullilove v. Klutznick, 448 U.S. 448 (1980). Rather, we understand these provisions to make clear that funds may be used to engage in active recruiting of minority teachers and to provide retraining and other employment opportunities to minority teachers on a neutral basis with nonminority teachers.

The Office of Management and Budget has advised that there is no objection to the submission of this report to the Congress from the standpoint of the Administration's program.

Sincerely,

Thomas M. Boyd
Acting Assistant Attorney General
Office of Legislative Affairs

No. 534

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

Office - Supreme Court, U.S.
FILED
OCT 30 1956
JOHN T. FEY, Clerk

PRESTON ALLEN, suing for himself and other American Indians similarly situated,
Petitioner

v.

PORTER L. MERRELL, individually and as County Clerk, Duchesne County, Utah

On Petition for a Writ of Certiorari to the Supreme Court of Utah

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,
Solicitor General,
Department of Justice,
Washington 25, D. C.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1956

No. 534

PRESTON ALLEN, suing for himself and other American Indians similarly situated,
Petitioner

v.

PORTER L. MERRELL, individually and as County Clerk, Duchesne County, Utah.

On Petition for a Writ of Certiorari to the Supreme Court of Utah.

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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1. The petition for certiorari in this case raises questions as to the validity, both on its face and in its application, of a statute of the State of Utah which provides: "Any person living upon any Indian or military reservation shall not be deemed a resident of Utah within the meaning of this chapter [dealing with voting], unless such person had acquired a residence in some county in Utah prior to taking up his residence upon such Indian or military reservation". (Utah Code Annotated, 1953, Sec. 20-2-14, par. 11).

It appears from the record that on March 23, 1956, the Attorney General of the State of Utah ruled that "Indians who live on the reservations are not entitled to vote in Utah and a Board of Co. y Commissioners has no duty to provide them with voting facilities." It also appears that although the statute refers generally to "any person living upon any Indian or military reservation", the statute is being

applied only to Indians residing on reservations and not to non-Indians residing on reservations (R. 8). In its per curiam opinion and order of October 25, 1956 (R. 19-20), the state Supreme Court denied relief, notwithstanding the uncontradicted allegations to that effect. It is settled, of course, that a law, non-discriminatory on its face, which is discriminatory in its operation violates the federal Constitution. Yick Wo v. Hopkins, 118 U.S. 356, 369; Griffin v. Illinois, 351 U.S. 12, 17, and cases there cited. Accordingly, the petition for certiorari presents, at the very least, a substantial question as to the validity of the Utah statute here involved in its practical application to petitioner and the similarly situated Indians on whose behalf this class suit was brought.

The Government submits, therefore, that review of this case by the Court is clearly warranted and, indeed, necessary in order to prevent frustration of the constitutional rights asserted by petitioner.

2. As the opinion of the Supreme Court of Utah states (R. 19), the last registration dates prior to the forthcoming election are October 30 and 31. In order that any judgment upholding petitioner's rights should be fully effective, it is essential that petitioner and other Indians similarly situated should be allowed to register and vote, subject to the final outcome of this litigation. At stake here are important constitutional rights which would be irretrievably lost, so far as the November 6 election is concerned, if interlocutory judicial relief is not immediately granted. If petitioner and other Indians living on reservations in Utah are allowed to register and vote, and their ballots are segregated and impounded pendente lite, no interest of the State would be impaired. On the contrary, the State, as well as the Federal Government, undoubtedly is concerned that the right to suffrage should not be improperly denied or lost.

Accordingly, we think that considerations of equity and public policy emphasize the importance of early consideration and decision of this case, and of issuance of such interlocutory relief as is necessary and proper. To that end, the Government suggests (1) that the petition for certiorari be granted forthwith, and the case be set down for early hearing; and (2) that the Court enter a stay order as requested in petitioner's motion (pp. 7-9), except in so far as petitioner seeks to have impounded the ballots of non-Indian voters.

The general power of the Court to afford such relief, incident to its power to review the judgment of the Supreme Court of Utah, is evidenced by the authorities cited in petitioner's memorandum in support of his motion. We think that no more need be added on that phase of the case.

That this case involves the right to vote does not limit the Court's general authority and duty to issue writs necessary to preserve its jurisdiction and to render a full and effective judgment. In recent years the Court has exercised such power (see Johnson v. Stevenson, 335 U.S. 801), and it is fair to say that there is now little question of the Court's authority to preserve voting rights by injunction or other mandatory relief. It is true that general statements can be found to the effect that equity does not protect "political rights" (see Giles v. Harris, 189 U.S. 475, 486-488; 43 Corp. Jur. Sec. p. 643), but the unfolding development of the law has limited the sweep of such dicta.[1/] Today, the right of voting stands on no lower plane than the

1/ In Giles v. Harris, relief was denied because the Court considered that it could not effectively redress the asserted violation of constitutional rights. In the instant case, however, there is no comparable question as to the breadth of the relief sought. See also Hume v. Mahan, 1 F. Supp. 142, 147 (E.D. Ky.), reversed on other grounds, 287 U.S. 575.

multitude of other civil rights which federal courts customarily and properly enforce where judicial remedies, including injunctive relief, can be effective.

The type of preliminary judicial relief which the Government and petitioner urge can be made effective here. Under Utah law, if persons in petitioner's class present themselves for registration by tomorrow, October 31, they can be registered for the coming election.[2/] A list will be prepared by the registration agent by the coming Saturday, November 3. This list will be posted to enable any qualified elector to object to the right to vote of any person whose name appears on the list. On election day, challenges may be made to the right of any person to vote, and separate lists of challenged voters are maintained.[3/] The ballots are to be retained for at least twelve months. Utah Code Ann. Secs. 20-2-6, 20-2-16, 20-2-17, 20-7-18, 20-7-32, 20-7-35, 20-7-38. Although the Utah statute apparently makes no provision for the segregation of ballots cast by challenged voters, we see no reason why, under this Court's decree, the election officials cannot retain the challenged ballots in separate packages, if this Court shall not have determined the merits of the case by November 6. In short, we have found nothing in the structure of the Utah election laws which would bar or conflict with the suggested interlocutory relief.

2/ The Utah Supreme Court has said that, if a voter who applies for registration is improperly refused registration by a registration official, he will not be deprived of his right to vote (if he appears to vote) by virtue of the failure of the official to mark him as a registered voter. Earl v. Lewis, 28 Utah 116, 126.

3/ The Utah statutes are ambiguous as to whether the election officials were intended to be the sole and ultimate judges of a challenge made at the polls, without judicial determination of the right to vote (Utah Code Ann. § 20-7-18), but nothing in the Utah statutes would prohibit an election official, in compliance with a decree of this Court, from accepting a ballot from a challenged voter, segregating it and impounding it pending the final outcome of the litigation.

CONCLUSION

The petition for certiorari should be granted forthwith; the case should be set down for early hearing; and the Court should grant, before October 31, if possible, interlocutory relief of the type described above.

Respectfully submitted.

J. LEE RANKIN,
Solicitor General.

OCTOBER 30, 1956.

FILED

MAY 10 1999

CLERK

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH DAKOTA

THE UNITED STATES OF AMERICA, Plaintiff, v. DAY COUNTY, SOUTH DAKOTA; DAY COUNTY COMMISSION; LEONARD NAESSIG, LINDA WALTERS, ORVILLE HASELHORST, DARRYL HILLDEBRANT, and DOUG SMEINS each in his official capacity as Day County Commissioner; ENEMY SWIM SANITARY DISTRICT; THOMAS KNUTSON, DAVID BENIKE, and RAYMOND FOSTER, each in his official capacity as Enemy Swim Sanitary District Trustee, Defendants.	No. CV99-1021

COMPLAINT

The United States of America, plaintiff herein, alleges:

1. This action is brought on behalf of the United States by the Attorney General pursuant to 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), 1971(c), Sections 2 and 12(d) of the Voting Rights Act of 1965, as amended, 42 U.S.C. 1973 and 1973j(d), and pursuant to 28 U.S.C. 2201 to enforce rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution.

2. This Court has jurisdiction over this action pursuant to 42 U.S.C. 1971(d), 42 U.S.C. 1973j(f), and 28 U.S.C. 1345.

3. Defendant Day County is a political and geographical subdivision of the State of South Dakota and exists under the laws of that state.

4. Defendant Day County Commission is the governing body of Day County, established under the laws of the State of South Dakota. The commission is responsible for exercising the powers inherent in conducting county business including the approval for incorporating sanitary districts located in the county.

5. Defendants Leonard Naessig, Doug Smeins, Orville Hasslehorst, Linda Walters, and Darryl Hildebrant are the duly elected members of the Day County Commission. Each of these defendants is sued in his official capacity.

6. Defendant Enemy Swim Sanitary District is a political and geographical subdivision of the State of South Dakota and exists under the laws of that state. Defendant Enemy Swim Sanitary District is charged with the responsibility of conducting the business of the sanitary district.

7. Defendants Thomas Knutson, David Benike, and Raymond Foster are the duly elected members of the Enemy Swim Sanitary District. Each member is eligible to vote on all matters presented to the sanitary district. Each of these defendants is sued in his official capacity.

8. A sanitary district is a governmental subdivision of South Dakota and a public body, corporate and politic. Sanitary districts have the power to construct and operate storm sewers, sanitary sewers, and waste disposal systems. Enemy Swim Sanitary District is governed by a board of three trustees who are elected at-large and serve three-year staggered terms. South Dakota Codified Laws ("SDCL") 34A-5-1 to 34A-5-56.

9. Under South Dakota law, the Day County Commission is required to receive requests to incorporate a sanitary district within the boundaries of Day County and shall make an order declaring that with the assent of the voters, the territory shall become an incorporated sanitary district "if the board shall be satisfied that the requirements of this chapter have been fully complied with." SDCL 34A-5-7 (1997).

10. In 1991, the Day County Commissioners approved the incorporation of Enemy Swim Lake Sanitation District. The boundaries of the district included all lakefront property of Enemy Swim Lake and Campbell Slough, including land owned and held in trust for Native Americans. All qualified persons of voting age residing in the district were allowed to vote in elections regarding establishment of the sanitary district and in the subsequent election of trustees.

11. On December 4, 1991, the Circuit Court for the Fifth Judicial District for the State of South Dakota in Benike v.

Enemy Swim Sanitation District, Case No. 91-98, dissolved the sanitation district because the petition for incorporation failed to meet the South Dakota statute's requirements regarding the establishment of a sanitary district, particularly the requirement that one-third of voting age citizens in the district must sign the petition. See SDCL 34A-5-7 (1997).

12. In February 1992, a former trustee of the dissolved sanitation district submitted a petition to the Day County Commissioners requesting that a sanitary district around Enemy Swim Lake and Campbell Slough again be incorporated. The boundaries of the proposed district included all lakefront property of Enemy Swim Lake and Campbell Slough, including land owned and held in trust for Native Americans.

13. The February 1992 petition for incorporation met all of the South Dakota statute's requirements regardihg the establishment of a sanitary district. See SDCL 34A-5-7 (1997). Members of the community who are not Native American expressed opposition to the February 1992 petition, however, because it would include Native American voters in the district. The Day County Commission failed to approve the February 1992 petition for incorporation.

14. Prior to Defendant Day County Commission's failure to approve the February 1992 petition for incorporation, the Commissioners had a practice of approving the incorporation of

a sanitary district when the submitting party met the requirements of South Dakota's sanitary district statute, SDCL 34A-5-7 (1997).

15. On July 27, 1993, the Day County Commissioners approved the incorporation of a different sanitary district, the defendant Enemy Swim Sanitary District. The petition for incorporation of defendant Enemy Swim Sanitary District expressly excluded from the boundaries of the sanitary district land owned by or held in trust for Native Americans.

16. The boundaries of defendant Enemy Swim Sanitary District are comprised of several noncontiguous pieces of land around Enemy Swim Lake and Campbell Slough -- approximately thirteen percent of the land around these two lakes. None of the land owners or residents are Native American. See Attachment A to this Complaint.

17. After the election of Defendant Enemy Swim Sanitary District Trustees in October 1993, Native Americans repeatedly have requested from Defendant Enemy Swim Sanitary District and Defendant Enemy Swim Sanitary District Trustees ("Sanitary District Defendants") that the district include Native American land in the Enemy Swim Sanitary District and that Native Americans have the opportunity to participate in electing the governing representatives of the sanitary district. Sanitary District Defendants have refused to include Native American land in the sanitary district. Sanitary District Defendants

continue to maintain a district that prohibits Native Americans from having the opportunity to participate in the sanitary district election process.

18. As a result of Defendants' actions, Native Americans residing on the land around Enemy Swim Lake and Campbell Slough cannot vote in Enemy Swim Sanitary District elections or participate in the decision-making process for the district.

19. There has been racial hostility in the community aimed at Native Americans concerning inclusion of Native American voters in the Enemy Swim Sanitary District.

20. Native Americans in South Dakota and Day County historically have been subject to discriminatory treatment, including a long history of official discrimination in voting.

21. The intentional exclusion of Native Americans from the sanitary district, the oddly-shaped and noncontiguous nature of the district, the failure to approve a sanitary district that included all people around the lake, the continuing refusal to include Native American lands in the sanitary district, the hostility against Native Americans, and the other allegations contained in paragraphs 9-20 of this Complaint demonstrate a discriminatory purpose to deny Native Americans the opportunity to participate in sanitary district elections.

22. Defendants' actions described in paragraphs 9-21 above violate Section 2 of the Voting Rights Act, 42 U.S.C.

1973, and the rights guaranteed by the Fourteenth and Fifteenth Amendments to the United States Constitution in that the actions have been taken with the purpose and effect of denying the right of Native Americans to vote in sanitary district elections on account of race or color.

23. Defendants' actions described in paragraphs 9-21 above violate 42 U.S.C. 1971(a)(1) and 1971(a)(2)(A) in that the actions have been taken with the purpose and effect of denying the right to vote to Native Americans that are otherwise qualified to be sanitary district residents and voters.

24. Unless enjoined by an order of this Court, Defendants will continue to maintain Defendant Enemy Swim Sanitary District for the purpose and with the effect of denying Native Americans the rights guaranteed by 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), Section 2 of the Voting Rights Act, '42 U.S.C. 1973, and the Fourteenth and Fifteenth Amendments to the United States Constitution.

WHEREFORE, the United States prays that the Court enter a judgment:

1) Declaring that the Enemy Swim Sanitary District as presently comprised violates 42 U.S.C. 1971(a)(1), 1971(a)(2)(A), Section 2 of the Voting Rights Act, 42 U.S.C. 1973, and the guarantees of the Fourteenth and Fifteenth Amendments of the United States Constitution;

2) Enjoining Defendants, their successors in office, their agents and all person acting in concert with them, from incorporating a sanitary district around and near Enemy Swim Lake and Campbell Slough that excludes Native Americans from voting and otherwise participating in the sanitary district on account of race or color;

3) Enjoining Defendants, their successors in office, their agents and all persons acting in concert with them, from administering any elections, including elections for trustees, of any sanitary district around and near Enemy Swim Lake and Campbell Slough that excludes Native Americans from voting and otherwise participating in the sanitary district on account of race or color;

4) Ordering Defendants, their successors in office, their agents and all persons acting in concert with them, to reincorporate the Enemy Swim Sanitary District to include Native Americans that reside around and near Enemy Swim Lake and Campbell Slough; and

5) Ordering Defendants, their successors in office, their agents and all person acting in concert with them, to hold elections in the newly-comprised district as promptly as possible.

Plaintiff further prays that this Court grant such additional relief as the interests of justice may require, together with the costs and disbursements of this action.

JANET RENO
Attorney General

KAREN SCHREIER
United States Attorney

BILL LANN LEE
Acting Assistant Attorney General
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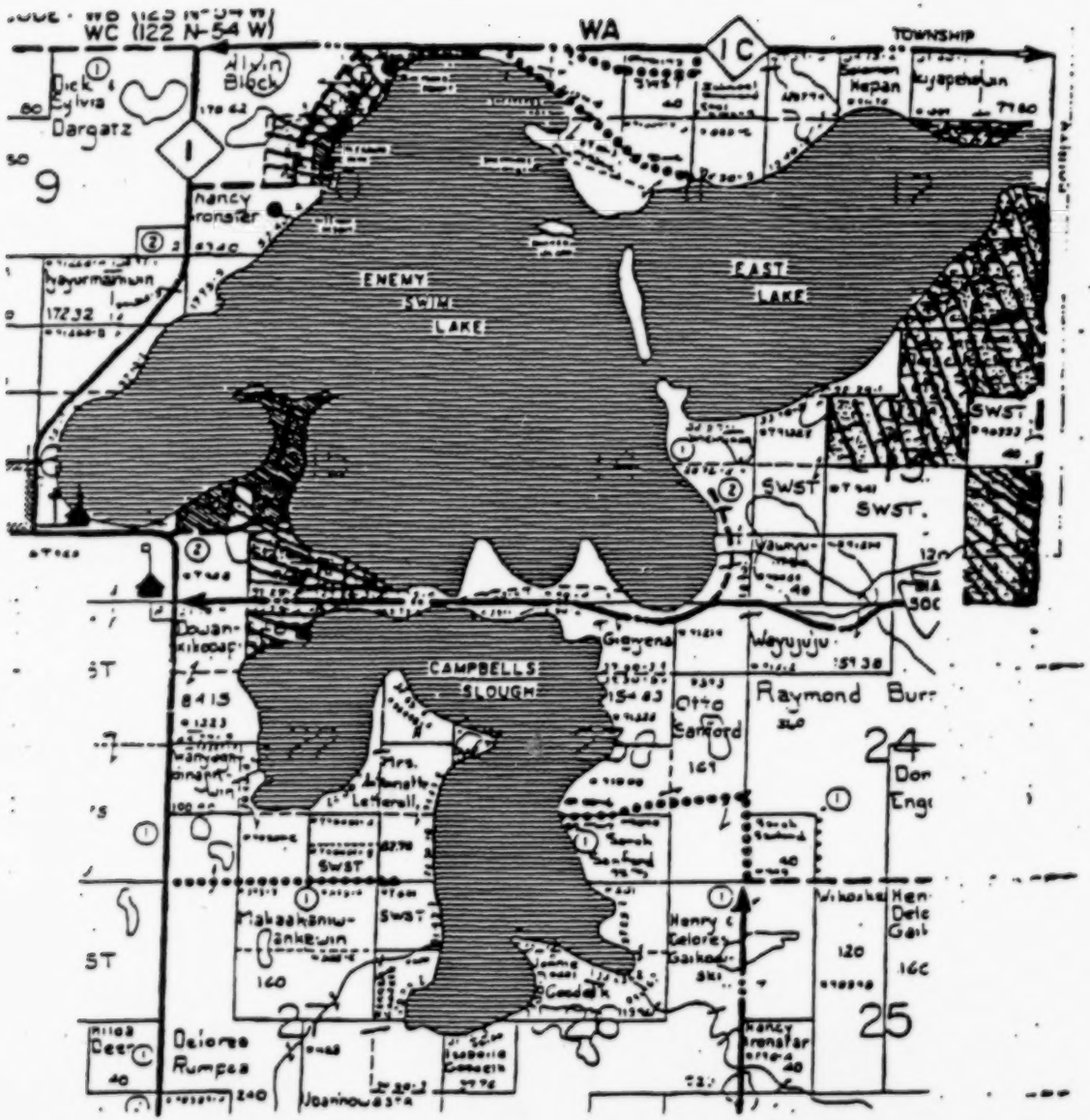
ATTACHMENT A

Legend -- Red Cr ss Hatch
Repres..its Enemy
Swim Sanitary District



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DEPARTMENT OF JUSTICE POLICY ON INDIAN SOVEREIGNTY AND GOVERNMENT-TO-GOVERNMENT RELATIONS WITH INDIAN TRIBES

PURPOSE: To reaffirm the Department's recognition of the sovereign status of federally recognized Indian tribes as domestic dependent nations and to reaffirm adherence to the principles of government-to-government relations; to inform Department personnel, other federal agencies, federally recognized Indian tribes, and the public of the Department's working relationships with federally recognized Indian tribes; and to guide the Department in its work in the field of Indian affairs.

I. INTRODUCTION

From its earliest days, the United States has recognized the sovereign status of Indian tribes as "domestic dependent nations." Cherokee Nation v. Georgia, 30 U.S. (5 Pet.) 1, 17 (1831). Our Constitution recognizes Indian sovereignty by classing Indian treaties among the "supreme Law of the land," and establishes Indian affairs as a unique area of federal concern. In early Indian treaties, the United States pledged to "protect" Indian tribes, thereby establishing one of the bases for the federal trust responsibility in our government-to-government relations with Indian tribes. These principles continue to guide our national policy towards Indian tribes.

A. THE EXECUTIVE MEMORANDUM ON GOVERNMENT-TO-GOVERNMENT RELATIONS BETWEEN THE UNITED STATES AND INDIAN TRIBES

On April 29, 1994, at a historic meeting with the heads of tribal governments, President Clinton reaffirmed the United States'

"unique legal relationship with Native American tribal governments" and issued a directive to all executive departments and agencies of the Federal Government that:

As executive departments and agencies undertake activities affecting Native American tribal rights or trust resources, such activities should be implemented in a knowledgeable, sensitive manner respectful of tribal sovereignty.

President Clinton's directive requires that in all activities relating to or affecting the government or treaty rights of Indian tribes, the executive branch shall:

1) operate within a government-to-government relationship with federally recognized Indian tribes;

2) consult, to the greatest extent practicable and permitted by law, with Indian tribal governments before taking actions that affect federally recognized Indian tribes;

3) assess the impact of agency activities on tribal trust resources and assure that tribal interests are considered before the activities are undertaken;

4) remove procedural impediments to working directly with tribal governments on activities that affect trust property or governmental rights of the tribes; and

5) work cooperatively with other agencies to accomplish these goals established by the President.

The Department of Justice is reviewing programs and procedures to ensure that we adhere to principles of respect for Indian tribal governments and honor our Nation's trust responsibility to Indian tribes. Within the Department, the Office of Tribal Justice has been formed to coordinate policy towards Indian tribes both within the Department and with other agencies of the Federal Government, and to assist Indian tribes as domestic dependent nations within the federal system.

B. FEDERAL INDIAN SELF-DETERMINATION POLICY

President Clinton's executive memorandum builds on the firmly established federal policy of self-determination for Indian tribes. Working together with Congress, previous Presidents affirmed the fundamental policy of federal respect for tribal self-government. President Johnson recognized "the right of the first Americans . . . to freedom of choice and self-determination." President Nixon strongly encouraged "self-determination" among the Indian people. President Reagan pledged "to pursue the policy of self-government" for Indian tribes and reaffirmed "the government-to-government basis" for dealing with Indian tribes. President Bush recognized that the Federal Government's "efforts to increase tribal self-governance have brought a

renewed sense of pride and empowerment to this country's native peoples."

II. PRINCIPLES OF INDIAN SOVEREIGNTY AND THE TRUST RESPONSIBILITY

Though generalizations are difficult, a few basic principles provide important guidance in the field of Indian affairs: 1) the Constitution vests Congress with plenary power over Indian affairs; 2) Indian tribes retain important sovereign powers over "their members and their territory," subject to the plenary power of Congress; and 3) the United States has a trust responsibility to Indian tribes, which guides and limits the Federal Government in dealings with Indian tribes. Thus, federal and tribal law generally have primacy over Indian affairs in Indian country, except where Congress has provided otherwise.

III. DEPARTMENT OF JUSTICE RECOGNITION OF INDIAN SOVEREIGNTY AND THE FEDERAL TRUST RESPONSIBILITY

The Department resolves that the following principles will guide its interactions with the Indian tribes.

A. THE SOVEREIGNTY OF INDIAN TRIBES

The Department recognizes that Indian tribes as domestic dependent nations retain sovereign powers, except as divested by the United States, and further recognizes that the United States has the authority to restore federal recognition of Indian sovereignty in order to strengthen tribal self-governance.

The Department shall be guided by principles of respect for Indian tribes and their sovereign authority and the United States' trust responsibility in the many ways in which the Department takes action on matters affecting Indian tribes. For example, the Department reviews proposed legislation, administers funds that are available to tribes to build their capacity to address crime and crime-related problems in Indian country, and in conjunction with the Bureau of Indian Affairs and tribal police, provides essential law enforcement in Indian country. The Department represents the United States, in coordination with other federal agencies, in litigation brought for the benefit of Indian tribes and individuals, as well as in litigation by Indian tribes or individuals against the United States or its agencies. In litigation as in other matters, the Department may take actions and positions affecting Indian tribes with which one or more tribes may disagree. In all situations, the Department will carry out its responsibilities consistent with the law and this policy statement.

B. GOVERNMENT-TO-GOVERNMENT RELATIONSHIPS WITH INDIAN TRIBES

In accord with the status of Indian tribes as domestic dependent

nations, the Department is committed to operating on the basis of government-to-government relations with Indian tribes.

Consistent with federal law and other Departmental duties, the Department will consult with tribal leaders in its decisions that relate to or affect the sovereignty, rights, resources or lands of Indian tribes. Each component will conduct such consultation in light of its mission. In addition, the Department has initiated national and regional listening conferences and has created the Office of Tribal Justice to improve communications with Indian tribes. In the Offices of the United States Attorneys with substantial areas of Indian country within their purview, the Department encourages designation of Assistant U.S. Attorneys to serve as tribal liaisons.

In order to fulfill its mission, the Department of Justice endeavors to forge strong partnerships between the Indian tribal governments and the Department. These partnerships will enable the Department to better serve the needs of Indian tribes, Indian people, and the public at large.

C. SELF-DETERMINATION AND SELF-GOVERNANCE

The Department is committed to strengthening and assisting Indian tribal governments in their development and to promoting Indian self-governance. Consistent with federal law and Departmental responsibilities, the Department will consult with tribal governments concerning law enforcement priorities in Indian country, support duly recognized tribal governments, defend the lawful exercise of tribal governmental powers in coordination with the Department of the Interior and other federal agencies, investigate government corruption when necessary, and support and assist Indian tribes in the development of their law enforcement systems, tribal courts, and traditional justice systems.

D. TRUST RESPONSIBILITY

The Department acknowledges the federal trust responsibility arising from Indian treaties, statutes, executive orders, and the historical relations between the United States and Indian tribes. In a broad sense, the trust responsibility relates to the United States' unique legal and political relationship with Indian tribes. Congress, with plenary power over Indian affairs, plays a primary role in defining the trust responsibility, and Congress recently declared that the trust responsibility "includes the protection of the sovereignty of each tribal government." 25 U.S.C. 3601.

The term "trust responsibility" is also used in a narrower sense to define the precise legal duties of the United States in managing property and resources of Indian tribes and, at times, of individual Indians.

The trust responsibility, in both senses, will guide the Department in litigation, enforcement, policymaking and proposals for

legislation affecting Indian country, when appropriate to the circumstances. As used in its narrower sense, the federal trust responsibility may be justiciable in some circumstances, while in its broader sense the definition and implementation of the trust responsibility is committed to Congress and the Executive Branch.

E. PROTECTION OF CIVIL RIGHTS

Federal law prohibits discrimination based on race or national origin by the federal, state and local governments, or individuals against American Indians in such areas as voting, education, housing, credit, public accommodations and facilities, employment, and in certain federally funded programs and facilities. Various federal criminal civil rights statutes also preserve personal liberties and safety. The existence of the federal trust responsibility towards Indian tribes does not diminish the obligation of state and local governments to respect the civil rights of Indian people.

Through the Indian Civil Rights Act, Congress selectively has derived essential civil rights protections from the Bill of Rights and applied them to Indian tribes. 25 U.S.C. 1301. The Indian Civil Rights Act is to be interpreted with respect for Indian sovereignty. The primary responsibility for enforcement of the Act is invested in the tribal courts and other tribal fora. In the criminal law context, federal courts have authority to decide habeas corpus petitions after tribal remedies are exhausted.

The Department of Justice is fully committed to safeguarding the constitutional and statutory rights of American Indians, as well as all other Americans.

F. PROTECTION OF TRIBAL RELIGION AND CULTURE

The mandate to protect religious liberty is deeply rooted in this Nation's constitutional heritage. The Department seeks to ensure that American Indians are protected in the observance of their faiths. Decisions regarding the activities of the Department that have the potential to substantially interfere with the exercise of Indian religions will be guided by the First Amendment of the United States Constitution, as well as by statutes which protect the exercise of religion such as the Religious Freedom Restoration Act, the American Indian Religious Freedom Act, the Native American Graves Protection and Repatriation Act, and the National Historic Preservation Act.

The Department also recognizes the significant federal interest in aiding tribes in the preservation of their tribal customs and traditions. In performing its duties in Indian country, the Department will respect and seek to preserve tribal cultures.

IV. DIRECTIVE TO ALL COMPONENTS OF THE DEPARTMENT OF JUSTICE

The principles set out here must be interpreted by each component of the Department of Justice in light of its respective mission. Therefore, each component head shall make all reasonable efforts to ensure that the component's activities are consistent with the above sovereignty and trust principles. The component heads shall circulate this policy to all attorneys in the Department to inform them of their responsibilities. Where the activities and internal procedures of the components can be reformed to ensure greater consistency with this Policy, the component head shall undertake to do so. If tensions arise between these principles and other principles which guide the component in carrying out its mission, components will develop, as necessary, a mechanism for resolving such tensions to ensure that tribal interests are given due consideration. Finally, component heads will appoint a contact person to work with the Office of Tribal Justice in addressing Indian issues within the component.

V. DISCLAIMER

This policy is intended only to improve the internal management of the Department and is not intended to create any right enforceable in any cause of action by any party against the United States, its agencies, officers, or any person.

_____ Date:_____

Janet Reno
Attorney General

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Last Updated August 13,1999
usdoj-jmd/irm/cas/sat

U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

January 30, 1989

Honorable Daniel K. Inouye
Chairman
Select Committee on Indian Affairs
United States Senate
Washington, D.C. 20510

Dear Mr. Chairman:

I am writing in response to your letter of November 29, 1988, to Douglas W. Kmiec, Assistant Attorney General for the Office of Legal Counsel (OLC). Your letter requested copies of all documents that OLC has prepared concerning the Indian preference provisions in Public Law 100-297 (the Act). The only document that is responsive to your request is a memorandum, dated November 9, 1988, from Mr. Kmiec to Diane Weinstein, Acting General Counsel, Department of Education (the OLC Opinion).[1] The OLC Opinion provides legal advice on the constitutionality of the preferences contained in the Act.

It is the established policy and practice of the Department of Justice that its legal advice to clients within the executive branch is generally confidential. The Department's established method for communicating to Congress its opinion on legal issues is to provide a letter or testimony setting forth the Department's legal position.

With that in mind, and without waiving the confidentiality of the advice contained in the OLC Opinion, on November 30, 1988, a representative of OLC briefed a member of your staff on the Department's position on the constitutionality of the preferences contained in the Act. As a further effort to accommodate your

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[1] We do not read your request for documents prepared by the Office of Legal Counsel to include drafts prepared by staff attorneys, since these have no official force or standing. Nor do we read your request to include documents prepared at the bill comment stage, since your letter referred only to implementation of Public Law 100-297.

oversight interest, we now offer the following written statement of the Department's position.

We believe that the preference granted by the Act to those who are actual members of an Indian tribe is constitutional under Morton v. Mancari, 417 U.S. 535 (1974). Those preferences for Indians, however, that do not depend, even in part, upon membership in an Indian tribe, but rather depend solely upon being a person of the Indian racial group, are not justified under that decision, and accordingly must be examined under Supreme Court precedent governing the use of racial classifications.

Section 5341(c) of the Act provides that the Secretary of Education "shall give a preference to Indians in all personnel actions" within the OIE. Section 5351(4) in turn defines "Indian" for purposes of the Act as including any individual who is:

> (A) a member of an Indian tribe, band, or other organized group of Indians (as defined by the Indian tribe, band or other organized group), including those Indian tribes, bands, or groups terminated since 1940 and those recognized by the State in which they reside,
>
> (B) a descendant, in the first or second degree, of an individual described in subparagraph (A),
>
> (C) considered by the Secretary of the Interior to be an Indian for any purpose,
>
> (D) an Eskimo, Aleut, or other Alaska Native, or
>
> (E) is determined to be an Indian under regulations promulgated by the Secretary [of Education] after consultation with the National Advisory Council on Indian Education.

The inclusion in subsection (C) of any individual who is "considered by the Secretary of the Interior to be an Indian for any purpose" in effect incorporates into Section 5351 the definition of "Indian" contained in 25 C.F.R. 5.1 (1988):

> (a) Members of any recognized Indian tribe now under Federal Jurisdiction;
>
> (b) Descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation;
>
> (c) All others of one-half or more Indian blood of tribes indigenous to the United States;

> (d) Eskimos and other aboriginal people of Alaska; and
>
> (e) For two (2) years or until the Osage Tribe has formally organized, whichever comes first, effective September 15, 1986, a person of at least one-quarter degree Indian ancestry of the Osage Tribe of Indians, whose rolls were closed by an Act of Congress.

Thus, the Act includes within the definition of "Indian" three classifications that are purely racial: "a descendant, in the first or second degree," of members of organized Indian groups (evidently without regard to their continued membership in an organized Indian group), "Eskimo, Aleut, or other Alaska Native," and, through the incorporated Interior regulations, persons "of one-half or more Indian blood."[2] Section 5351(4)(B) and (D); 25 C.F.R. 5.1(b), (c) and (d).[3]

Racial classifications are constitutionally suspect. Personnel Adm'r of Mass. v. Feeney, 442 U.S. 256, 272 (1979) ("A racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification."); Bolling v. Sharpe, 347 U.S. 497, 499 (1954). Although Indians enjoy a special position under the law, the Supreme Court has consistently emphasized that racially-based legislation is not automatically exempt from constitutional prohibitions on racial discrimination simply

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[2] In an effort to give the incorporated regulations a constitutional construction, we considered whether the reference in 25 C.F.R. 5.1(c) to "tribes indigenous to the United States" could be construed as a tribal, rather than a racial, classification. We concluded that it could not: it is, rather, a mere limitation on the racial classification of those persons of "one-half or more Indian blood," not a separate requirement of tribal membership. Any other reading would make the "membership" language of 25 C.F.R. 5.1(a) mere surplusage.

[3] We note that the incorporation of the Interior regulations into Section 5351 results in the inclusion of two categories of "descendants," each defined in slightly different terms. Compare Section 5351(4)(B) and 25 C.F.R. 5.1(b). Similarly, there are two slightly different Eskimo categories defined in Section 5351(4)(D) and 25 C.F.R. 5.1(d). For purposes of this opinion, we treat the duplicate definitions as functionally equivalent: all, moreover, constitute racial classifications.

In particular, 25 C.F.R. 5.1(b) is not saved by its reference to residence "within the present boundaries of any Indian reservation;" that reference is to residence as of 1934, and does not impose any requirement that current beneficiaries of the preference reside on an Indian reservation.

because the legislation involves or benefits Indians. E.g., Washington v. Yakima Indian Nation, 439 U.S. 463, 500-01 (1979); Craig v. Boren, 429 U.S. 190, 209 n.22 (1976) (laws which discriminate with respect to Indians on racial grounds are of "questionable constitutionality").

In Morton v. Mancari, 417 U.S. 535 (1974), the Supreme Court upheld the Indian preference contained in the Indian Reorganization Act of 1934 against a limited constitutional challenge. In contrast to the definition of "Indian" at issue here, the regulations in Mancari defined eligibility for the preference as follows:

> To be eligible for preference in appointment, promotion, and training, an individual must be one-fourth or more degree Indian blood and be a member of a Federally-recognized tribe.

417 U.S. at 553 n.24, quoting 44 BIAM 335, 3.1 (emphasis supplied). The Court explicitly relied on this definition to uphold the preference against the claim that it was racially discriminatory:

> The preference, as applied, is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities . . . .
>
> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as Indians. In this sense, the preference is political rather than racial in nature.

417 U.S. at 554 and 553 n.24 (emphasis supplied).[4] Moreover, it is significant that throughout its constitutional discussion the Court refers to those Indians receiving benefits as "tribal Indians."[5] E.g., id. at 552-55.

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[4] Thus, although the classification contained a racial element (the "Indian blood" requirement), the Court held that the classification's further requirement of tribal membership was sufficient to save the preference.

[5] The Supreme Court also noted that the preference only applied to employment in the Indian service and therefore was reasonably and directly related to a legitimate, nonracially (continued...)

The Supreme Court has repeatedly relied upon this distinction between tribal and racial classifications in upholding Indian preferences against attack on racial discrimination grounds. E.g., Washington v. Yakima Indian Nation, supra, 439 U.S. at 500-01 ("It is settled that 'the unique legal status of Indian tribes under federal law' permits the Federal Government to enact legislation singling out tribal Indians, legislation that might otherwise be constitutionally offensive," quoting Mancari); United States v. Antelope, 430 U.S. 641, 646 (1977) ("Federal regulation of Indian tribes, therefore, is governance of once-sovereign political communities; it is not to be viewed as legislation of a '"racial" group consisting of "Indians" . . .,'" quoting Mancari); Moe v. Salish and Kootenai Tribes, 425 U.S. 463, 480 (1976) ("statutes . . . according special treatment to Indian tribes and reservations" are "neither 'invidious' nor 'racial,'" citing Mancari); Fisher v. District Court, 424 U.S. 382, 390 (1976) (statute granting exclusive jurisdiction over certain claims to the Cheyenne Tribal Court, challenged as "impermissible racial discrimination," upheld on grounds that jurisdiction "does not derive from the race of the plaintiff but rather from the quasi-sovereign status of the Northern Cheyenne Tribe under federal law.").

As noted above, however, certain of the classifications contained in the Act and incorporated regulations are by their terms not tribal, but rather are "directed towards a 'racial' group consisting of Indians," and include Indians and Eskimos as members of "discrete racial groups." Unlike the situation in Mancari, an individual could be a member of one of the classifications included or incorporated in the Act solely on the basis of racial characteristics, without regard to membership in a tribe or other organized Indian group. Those classifications are thus outside the holding in Mancari, and are subject to the

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[5](...continued)
based goal -- that of furthering the cause of Indian self-government. Id. at 554. We do not believe that by adducing this additional distinction the Court implied that Indian preferences based on racial as opposed to tribal classifications would be constitutional if confined to positions that relate to Indian self-government. First, the Court made this additional distinction in the course of observing that even the tribal preference at issue would raise more difficult questions if applied to all government positions. Second, a broad racial preference in favor of Indians would not promote self-government because some non-tribal Indians evidently do not participate in tribal self-government. Third, the Court, in decisions since Mancari, has repeatedly invoked the racial/tribal distinction in considering challenges to Indian preferences.

scrutiny given to racial classifications in other, non-Indian contexts.

Granting preferences by means of these purely racial classifications would raise serious constitutional problems under the equal protection component of the Fifth Amendment. Although the Supreme Court has yet to speak with one voice on this issue, a plurality of the Court has held that express racial classifications may be employed only to further a compelling governmental interest, and must also be "narrowly tailored" to further that interest. Wygant v. Jackson Bd. of Education, 476 U.S. 267, 274 (1986) (plurality opinion). See also id. at 285-87 (O'Connor, J., concurring); Fullilove v. Klutznick, 448 U.S. 448, 480 (1980); University of California Bd. of Regents v. Bakke, 438 U.S. 265, 305 (1978) (opinion of Powell, J.).

The Wygant plurality identified only rectification of prior discrimination by the government unit involved as a governmental interest that is clearly sufficiently compelling to justify reliance on racial classifications. Wygant, supra, 476 U.S. at 274. In this regard, the "Court never has held that societal discrimination alone is sufficient to justify a racial classification." Id. Thus, under the Wygant plurality's standard, the purely racial classifications present in the Act could be justified only if the OIE had historically discriminated against Indians. However, even assuming such discrimination had occurred, and thus that the purely racial classifications furthered a compelling state interest, the classifications are not narrowly tailored to remedying past discrimination, and are thus unconstitutional.[6]

The Supreme Court has indicated that, in determining whether a remedy is narrowly tailored, a number of factors are relevant: among them, the necessity for the relief and the efficacy of alternative remedies; the relationship of any numerical requirements to available minority members in the relevant market; the availability of meaningful waiver provisions (particularly where members of the preferred group have not been actual victims of discrimination); the extent to which the remedy trammels the interests of innocent third parties; and the planned duration of the remedy. E.g., Fullilove, supra, 448 U.S. at 481-82; Local 28, Sheet Metal Workers Int'l Ass'n v. EEOC, 478 U.S. 421, 477-79

[6] We note that, after the OLC opinion was prepared, the Supreme Court decided Richmond v. Croson Co., No. 87-998 (Jan. 23, 1988). That decision emphasized that only those racial classifications that are designed to remedy prior discrimination, and are narrowly tailored to that end, will withstand strict constitutional scrutiny. The Croson decision thus provides further support for the OLC opinion.

(1986) (plurality opinion); id. at 484-86 (Powell, J., concurring).

No consideration seems to have been given to whether non-racial alternatives would have achieved the evidently desired result. Moreover, the purely racial classifications create a broad "overinclusive" racial preference that can apply in absolutely every case, to benefit every otherwise qualified applicant who fits within the racial classifications, and to disadvantage every otherwise qualified applicant who does not satisfy the racial criteria.[7] The classifications, moreover, operate to benefit many distinct groups, without reference to whether any individual within a specific statutory racial category (Aleuts, for example) ever suffered from any of the (assumed) historical discrimination. Such a broad brush approach is by definition not narrowly tailored, particularly in the absence of waiver provisions. See Wygant, supra, 476 U.S. at 284 n.13 (criticizing affirmative action plan for its "undifferentiated nature"); Fullilove, supra, 448 U.S. at 486-87 (facial challenge to "overinclusive" racial preference rejected on ground that "limit[ing]" waiver and exemption provisions cured overinclusiveness).[8] The preference by its terms is permanent, and

[7] Indeed, the sweeping and mandatory nature of the purely racial preference further distinguishes it from the use of race as a "plus" factor, sanctioned in Bakke, supra. See, e.g., 438 U.S. at 317 (opinion of Powell, J.).

[8] Section 5341(c) also provides that the preference is to be "implemented in the same fashion" as the veterans' preference established by 5 U.S.C. 2108(3). We are informed by the Department of Education that in the vast majority of cases, application of the veterans' preference results in qualified veterans being chosen over equally qualified non-veterans. In certain cases, however, the Department of Education evidently reserves the ability not to select a qualified veteran, due to supervening management concerns. It is perhaps arguable that the Indian preference in the Act could be implemented in such a way as to preserve some administrative flexibility. However, given the totality of the factors employed by the Supreme Court in determining whether a remedy is narrowly tailored, we do not believe that this limited flexibility, standing alone, is sufficient to render the purely racial classifications constitutional.

Furthermore, the Court sanctioned the waiver provisions in Fullilove because they provided "a reasonable assurance that application of racial or ethnic criteria will be limited to accomplishing the remedial objectives of Congress . . . ." 448 U.S. at 487. The Department of Education's administrative

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will continue to operate indefinitely into the future, long after the effects of the (assumed) historical discrimination have been remedied. The preference also appears to trammel the rights of innocent third parties. Each of these characteristics of the Act indicates that the Act's racial classifications transgress constitutional requirements as enunciated by the Supreme Court.[9]

Accordingly, we believe that the racial classifications contained in the Act and in the incorporated regulations are unconstitutional under Supreme Court precedent, even assuming a history of discrimination against Indians by the OIE. The OIE may nonetheless implement Section 5351(4)(A) and 25 C.F.R. 5.1(a), constituting those portions of Section 5351 and the incorporated regulations that do not contain purely racial classifications, and thus are not constitutionally suspect.[10] Further, the Secretary of Education is free to adopt additional regulations defining "Indian" for purposes of the preference,

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[8](...continued)
flexibility under the Act, however, appears designed to recognize more general management concerns, rather than in any way serving to insure that racially-based classifications are only employed to remedy actual instances of discrimination. That flexibility, therefore, cannot be viewed as serving to render the preferences contained in the Act more "narrowly tailored" for constitutional purposes.

[9] Even assuming that in a given case the Act could be applied in accordance with the Constitution, that alone is not sufficient to rebut a constitutional challenge. E.g., as the Court indicated in Fullilove, a statute that is challenged as being overbroad on its face "cannot pass muster" unless the Court is able to conclude that the overbroad statute will be limited in its application to accomplishing proper remedial objectives. 448 U.S. at 486-87.

[10] The Act also grants a one-time preference to individuals who "are not Indians," "are serving within the Office of Indian Education on the date of enactment of this Act," and "desire to take another position in the Department of Education which is not within the Office of Indian Education and for which there is a vacancy." Section 5341(c)(2). Although this provision appears to be intended, in part, to compensate for the effects of the Indian preference, this one-time preference is also constitutionally suspect, but may be sustainable if extended to include all non-tribal Indians as well and if it is limited to creating openings for the constitutionally legitimate tribal preferences. We have no evidence, however, to indicate that Congress intended the non-Indian preference to also include non-tribal Indians.

pursuant to Section 5351(4)(E), so long as those regulations are not otherwise contrary to law and do not offend the Constitution.

We hope that the November 30 briefing and the foregoing statement of the Department's position on the constitutionality of the preferences contained in the Act are sufficient to satisfy your oversight interest. If you have any further questions concerning this matter, please do not hesitate to contact me.

Sincerely,

Thomas M. Boyd
Assistant Attorney General

Supreme Court, U.S.
FILED
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No. 98-818

In the Supreme Court of the United States

HAROLD F. RICE, PETITIONER

v.

BENJAMIN J. CAYETANO,
GOVERNOR OF HAWAII

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Hawaii limits the right to vote for the trustees of the Office of Hawaiian Affairs to the "descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Const. Art. XII, § 5; Haw. Rev. Stat. § 10-2 (1993). The question presented is whether that voting requirement discriminates on the basis of race in violation of the Fourteenth or Fifteenth Amendments to the Constitution.

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ON WRIT OF CERTIORARI
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FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

The United States has a special responsibility for the welfare of the Native peoples of the United States, including Native Hawaiians. Pursuant to that responsibility, Congress has enacted many statutes for the benefit of Native Hawaiians. Congress has also delegated broad authority to administer a portion of the federal trust responsibility to the State of Hawaii, which enacted the voting provision at issue here in carrying out that responsibility. The United States therefore has a direct interest in the resolution of the question presented in this case.

STATEMENT

1. a. The Hawaiian Islands were originally settled by Polynesians from the Western Pacific. *Hawaii Housing Auth.* v. *Midkiff*, 467 U.S. 229, 232 (1984). In 1778, the first

documented encounter between Native Hawaiians and Europeans occurred when Captain James Cook sailed into Hawaiian waters. R. Tabrah, *Hawaii A History* 11 (1st ed. 1984). The native people Cook encountered "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Pub. L. No. 103-150, 107 Stat. 1510.[1] Even though indigenous Hawaiians were all one people with a common language, ancestry, and religion, at that point the eight islands were governed by four independent chiefdoms. Tabrah 13-14. Cook and his crew referred to the Hawaiian people as "Indians." See G. Daws, *Shoal of Time* 2 (1968).

In 1810, Kamehameha I united the islands into the Kingdom of Hawaii and became its first King. 107 Stat. 1510. Between 1826 and 1893, the United States recognized the Kingdom as a sovereign nation and signed several treaties with it. *Ibid.* During that same period, Americans gained increasing influence over the Kingdom's economy, acquiring control of three-fourths of Hawaii's commerce and most of its available land. S. Rep. No. 681, 55th Cong., 2d Sess. 78 (1898). Americans also began to dominate the Kingdom's political affairs. S. Doc. No. 16, 55th Cong., 3d Sess. 3 (1898). The social and economic changes in Hawaii had a "devastating" effect on the Native Hawaiian population and on their "health and well-being." 107 Stat. 1512. Foreigners brought new diseases to Hawaii, and the Native Hawaiian population plummeted. Tabrah 42.

In 1893, Queen Lili'uokalani threatened to reestablish Native Hawaiian control over governmental affairs. Tabrah 99. Fearing a loss of power, a group representing American commercial interests overthrew the monarchy and established a provisional government. 107 Stat. 1510. The overthrow was aided by the United States Minister to Hawaii, who caused armed naval forces to invade Hawaii. *Ibid.* The United States Minister immediately recognized the provisional government, which sought annexation to the United States. *Ibid.*

[1] The quotation is from the 1993 Joint Resolution of Congress to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. That resolution recites pertinent history.

President Cleveland refused to recognize the legitimacy of the provisional government and called for restoration of the monarchy. 107 Stat. 1511. Congress enacted a joint resolution annexing Hawaii, however, and in 1898 President McKinley signed the resolution. *Id.* at 1512. At the time of annexation, the provisional government ceded 1,800,000 acres of crown, government, and public lands to the United States. *Ibid.* In the Hawaiian Organic Act, ch. 339, § 91, 31 Stat. 159, Congress established the Territory of Hawaii, placed the ceded lands under its control, and directed that proceeds from the lands be used for the benefit of the inhabitants of Hawaii.

b. The condition of Native Hawaiians, however, continued to deteriorate, and in 1920 territorial representatives sought assistance from Congress. Noting that Hawaiian people had been "frozen out of their lands and driven into the cities," and that "Hawaiian people are dying," the representatives recommended allotting land to the Hawaiians so that they could reestablish their traditional way of life. H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920). The Secretary of the Interior echoed that recommendation, informing Congress that Native Hawaiians are "our wards * * * for whom in a sense we are trustees," that they "are falling off rapidly in numbers" and that "many of them are in poverty." *Ibid.* Those recommendations led to the enactment of the Hawaiian Homes Commission Act, 1920 (HHCA), ch. 42, 42 Stat. 108, which designated 200,000 acres of lands for homesteading by "Native Hawaiians." Congress found constitutional precedent for the HHCA in previous enactments granting Indians special privileges in using public lands.

H.R. Rep. No. 839, *supra*, at 11. In 1938, Congress again exercised its trust responsibility by granting Native Hawaiians exclusive fishing rights in the Hawaii National Park. Act of June 20, 1938, ch. 530, § 3(a), 52 Stat. 784.

In 1959, Hawaii was admitted into the Union. In the Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4, Congress required Hawaii to adopt the HHCA as part of the state constitution and transferred authority to the State to administer the HHCA lands. § 4, 73 Stat. 5. Congress also placed an additional 1.2 million acres of lands acquired through annexation into a trust to be managed by the State for one or more of five specified purposes, including "the betterment of the conditions of native Hawaiians." § 5(f), 73 Stat. 6.

Since Hawaii's admission into the Union, Congress has continued to accept responsibility for the welfare of Native Hawaiians. Congress has established special Native Hawaiian programs in the areas of health care, education, employment, and loans.[2] It has enacted statutes to preserve Native Hawaiian culture, language, and historical sites.[3] And, by classifying Native Hawaiians as "Native Americans" under numerous federal statutes, Congress has extended to Native Hawaiians many of "the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities." 42 U.S.C. 11701(2) and

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[2] Native Hawaiian Health Care Improvement Act, 42 U.S.C. 11701-11714; Native Hawaiian Education Act, 20 U.S.C. 7901-7912; Workforce Investment Act of 1998, Pub. L. No. 105-220, § 166, 112 Stat. 1021 (to be codified at 29 U.S.C. 2911 (Supp. IV 1998)); Native American Programs Act of 1974, 42 U.S.C. 2991-2992.

[3] See 16 U.S.C. 396d(a) (establishing "a center for the preservation, interpretation and perpetuation of traditional native Hawaiian activities and culture"); 20 U.S.C. 4441 (providing funding for Native Hawaiian arts and cultural development); Native American Languages Act, 25 U.S.C. 2901-2906 (1994 & Supp. III 1997); National Historic Preservation Act of 1966, 16 U.S.C. 470a(d)(6).

(19).[4] Those enactments reflect Congress's view that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of * * * Hawaii." 42 U.S.C. 11701(17). They are also premised on congressional findings that the conditions of Native Hawaiians in such areas as health and education continue to lag seriously behind those of non-Natives. 42 U.S.C. 11701(22); 20 U.S.C. 7902(17).

In 1993, Congress enacted a Joint Resolution to acknowledge the 100th anniversary of the overthrow of the Kingdom of Hawaii and to offer an apology to Native Hawaiians. 107 Stat. 1510. In that Joint Resolution, Congress acknowledged that the overthrow of the Kingdom of Hawaii was "illegal," "resulted in the suppression of the inherent sovereignty of the Native Hawaiian people," and deprived Native Hawaiians of their rights to "self-determination," *id.* at 1513; that "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," *id.* at 1512; that the provisional government ceded lands to the United States

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[4] See, *e.g.*, American Indian Religious Freedom Act, 42 U.S.C. 1996 *et seq.*; Native American Graves Protection and Repatriation Act, 25 U.S.C. 3001-3013; Native American Programs Act of 1974, 42 U.S.C. 2991-2992; National Museum of the American Indian Act, 20 U.S.C. 80q *et seq.*; Comprehensive Employment and Training Act, 29 U.S.C. 872; Drug Abuse Prevention, Treatment, and Rehabilitation Act, 21 U.S.C. 1177; Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, 42 U.S.C. 4577(c)(4); Cranston-Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 958, 104 Stat. 4422; National Historic Preservation Act of 1966, 16 U.S.C. 470 *et seq.*; Older Americans Act of 1965, 42 U.S.C. 3001 *et seq.*; Rehabilitation Act of 1973, 29 U.S.C. 701 *et seq.*; Developmental Disabilities Assistance and Bill of Rights Act Amendments of 1987, Pub. L. No. 100-146, § 502(a)(2), 101 Stat. 857; Disadvantaged Minority Health Improvement Act of 1990, 42 U.S.C. 201 *et seq.*; Indian Health Care Amendments of 1988, 25 U.S.C. 1601 *et seq.*

"without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government," *ibid.*; and that "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions," *id.* at 1512-1513. In light of those findings, Congress "express[ed] its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people." *Id.* at 1513. In other recent statutes, Congress has recognized Native Hawaiians as "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago," 42 U.S.C. 11701(1); 20 U.S.C. 7902(1), with whom the United States has a "special" "trust" relationship, 42 U.S.C. 11701(15), (16), (18), and (20); 20 U.S.C. 7902(8), (10), (11), (13), and (14).

Early federal statutes, such as the HHCA, defined "Native Hawaiian" as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(a)(7), 42 Stat. 108. All federal statutes enacted since 1974, however, have defined "Native Hawaiian" as any descendant of the aboriginal people of the Hawaiian Islands. See, *e.g.*, Native American Programs Act of 1974, 42 U.S.C. 2992c; 107 Stat. 1513; Native Hawaiian Education Act, 20 U.S.C. 7912(1).

c. In 1978, Hawaii amended its Constitution to establish the Office of Hawaiian Affairs (OHA). Haw. Const. Art. XII, § 5. OHA is the principal public agency responsible for the administration of programs relating to Native Hawaiians and Hawaiians. Haw. Rev. Stat. § 10-3 (1993). "Native Hawaiian" is defined as "any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the [HHCA]." *Id.* § 10-2.

"Hawaiian" is defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Ibid.* The latter definition was added to bring state law "in line with the current policy of the federal government to extend benefits for Hawaiians to all Hawaiians regardless of blood quantum." J.A. 46.

OHA administers two public trusts. The first consists of 20% of the proceeds from the public lands held in trust by the State under Section 5(f) of the Admission Act. That fund is administered for the benefit of "Native Hawaiians." Haw. Rev. Stat. § 10-13.5 (1993). The second trust consists of money appropriated by the state legislature and is administered for the benefit of "Hawaiians." Pet. App. 6a. OHA also administers federal funds made available to it for Native Hawaiians or Hawaiians. Haw. Rev. Stat. § 10-6(a)(8) (1993). The Hawaii Constitution establishes that OHA shall be managed by a board of trustees, who shall be "Hawaiians" and who shall be elected by "Hawaiians." Haw. Const. Art. XII, § 5.

Congress has recognized OHA's role in administering programs for Native Hawaiians, finding that OHA "serves and represents the interests of Native Hawaiians," 16 U.S.C. 470w(18), that OHA "has as a primary and stated purpose the provision of services to Native Hawaiians," *ibid.*, and that OHA has "expertise in Native Hawaiian affairs," 20 U.S.C. 80q-11(a)(2). See also 25 U.S.C. 3001(11). Congress has also made OHA eligible to administer federal programs on behalf of Native Hawaiians. 20 U.S.C. 4441(c)(2)(B), 7904(b)(3) and (f); 42 U.S.C. 2991b-1(a), 11711(7)(A)(ii). Congress has been fully aware that OHA's trustees are elected by indigenous Hawaiians. See S. Rep. No. 580, 100th Cong., 2d Sess. 32 (1988) (concluding that the election of the OHA trustees by Native Hawaiians represents "a rational means of effectuating the state's obligations under the trust re-

lationship to Native Hawaiians"); S. Rep. No. 140, 100th Cong., 1st Sess. 28 (1987) (same).

2. In March 1996, petitioner applied to vote in the election for the OHA Board of Trustees. Pet. App. 20a-21a. That application was denied on the ground that petitioner is not an indigenous "Hawaiian." *Id.* at 21a. Petitioner filed suit against the Governor of Hawaii (respondent), contending that the denial of his application to vote was based on a racial classification and therefore violated the Fourteenth and Fifteenth Amendments to the United States Constitution. *Id.* at 21a, 23a.

The district court granted respondent's motion for summary judgment. Pet. App. 19a-43a. Relying on *Morton* v. *Mancari*, 417 U.S. 535 (1974), the district court concluded that the voting restriction was based not on race but rather on the status of Native Hawaiians as an indigenous people who have a guardian-ward relationship with the United States and the State of Hawaii. Pet. App. 29a-35a. Applying rational basis scrutiny, the court upheld the voting restriction as a rational means of furthering the State's obligation under federal law to act for the betterment of Native Hawaiians. *Id.* at 35a-37a.

3. The court of appeals affirmed. Pet. App. 1a-18a. Noting that petitioner had not challenged the classification that underlies the trust and OHA, the court concluded that "we must accept the trusts and their administrative structure as we find them, and assume that both are lawful." *Id.* at 9a. In the court's view, it then followed that "the state may rationally conclude that Hawaiians, being the group to whom trust obligations run and to whom OHA trustees owe a duty of loyalty, should be the group to decide who the trustees ought to be." *Id.* at 9a-10a. The court stated the OHA voting law appeared to contain a racial classification on its face. *Id.* at 11a, 14a. The court ultimately concluded, however, that, given the nature of petitioner's challenge, and this Court's decision in *Mancari*, "the voting restriction is not

primarily racial, but legal or political." *Id.* at 10a. The court therefore concluded that the voting qualification does not violate the Fourteenth or Fifteenth Amendments. *Ibid.*

SUMMARY OF ARGUMENT

A. The classification in the OHA voting law has its source in federal law and therefore implicates Congress's plenary power to enact legislation on behalf of indigenous people with whom it has established a trust responsibility. Congress has broad power to identify indigenous groups falling within its Indian affairs power, and legislation on behalf of any such group is not to be viewed as discrimination based on race, as long it is rationally tied to the fulfillment of the United States' unique trust obligations.

B. Congress has identified Native Hawaiians as a distinct indigenous group within the scope of its Indian affairs power, and has enacted dozens of statutes on their behalf pursuant to its recognized trust responsibility. Congress's determination that Native Hawaiians constitute a distinct indigenous group for whom it may enact special legislation is entirely rational. Native Hawaiians have a cultural, historic, and land-based link to the indigenous people who exercised sovereignty over the Hawaiian Islands, and that group has never relinquished its claim to its sovereignty or its sovereign lands.

Petitioner seeks to derive from the Indian Commerce Clause's reference to "Tribes" a requirement that Congress may only take action on behalf of indigenous groups with present-day tribal governments. To the framers of the Constitution, however, an Indian tribe was simply a distinct group of indigenous people set apart by their common circumstances, a definition that Native Hawaiians satisfied in 1778 and satisfy today. Moreover, Congress has concluded that it has a trust obligation to Native Hawaiians precisely because it bears responsibility for the destruction of their government and their loss of sovereignty over their land.

The Constitution is not so self-defeating as to make the very reasons that Congress has concluded that it has a trust responsibility serve as an obstacle to the fulfillment of that responsibility. Nor is the existence of a tribal government necessary to make legislation on behalf of indigenous people non-racial. Congress does not extend services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has established a trust relationship.

C. When Congress delegates authority to a State to administer the federal trust responsibility, state laws that are within the scope of that authority are subject to the same constitutional analysis as legislation enacted by Congress itself. Hawaii has acted under such a delegation of authority here.

In the Admission Act, Congress delegated broad authority to Hawaii to act for the betterment of Native Hawaiians. The OHA voting law betters the conditions of Native Hawaiians in two complementary ways: it promotes self-determination by indigenous Hawaiians, and it helps to ensure that OHA will administer the trust in a way that is responsive to the interests of that indigenous group. Because petitioner's exclusion from the class of persons eligible to vote for the trustees of OHA is based on the State's legitimate desire to pursue those two non-racial goals, and not on petitioner's race, petitioner's Fourteenth and Fifteenth Amendment claims should be rejected.

ARGUMENT

HAWAII'S VOTING LAW DOES NOT DISCRIMINATE ON THE BASIS OF RACE IN VIOLATION OF THE FOURTEENTH OR FIFTEENTH AMENDMENTS

The State of Hawaii limits the right to vote for OHA trustees to "descendant[s] of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10-2 (1993); Haw. Const. Art. XII, § 5. Petitioner contends that the OHA voting law contains a racial classification that is prohibited by the Fifteenth Amendment and subject to strict scrutiny under the Fourteenth Amendment. The line drawn by the State, however, is based on the status of Hawaiians as an indigenous people of a once-sovereign nation with a unique trust relationship to the United States; it is not based on race. It therefore does not implicate the Fifteenth Amendment and is not subject to strict scrutiny under the Fourteenth Amendment. Instead, the relevant constitutional inquiry is whether the voting law is rationally tied to the fulfillment of the United States' unique responsibility towards an indigenous people as to whom it has a trust responsibility. The OHA voting law satisfies that standard.

A. Federal Legislation That Fulfills The Government's Unique Responsibility Towards Indians Does Not Discriminate On The Basis Of Race

Because the State's voting provision is based on a classification that has its source in federal law, petitioner's challenge implicates Congress's power to enact legislation for the benefit of indigenous people, or "Indians" as the Constitution refers to them. We therefore begin with a discussion of that power.

1. The term "Indian" was first applied by Columbus to the native people of the New World based on the mistaken belief that he had found a sea route to India. The term has been understood ever since to refer to the indigenous people who inhabited the New World before the arrival of the first Europeans. See *Worcester* v. *Georgia*, 31 U.S. (6 Pet.) 515, 544 (1832) (referring to Indians as "those already in possession [of the land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man"); *Johnson* v. *M'Intosh*, 21 U.S. (8 Wheat.) 543, 572-574 (1823) (referring to Indians as "original inhabitants" or "natives" who occupied the New World before discovery by "the great nations of Europe").

The Constitution allocates to Congress "plenary power over Indian affairs." *Alaska* v. *Native Village of Venetie Tribal Gov't*, 522 U.S. 520, 531 n.6 (1998); *United States* v. *Wheeler*, 435 U.S. 313, 319 (1978); *Mancari*, 417 U.S. at 551-552. "The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself." *Ibid.* The Indian Commerce Clause, Art. I, § 8, Cl. 3, expressly provides Congress with the power to "regulate Commerce with * * * the Indian Tribes," and the Treaty Clause, Art. II, § 2, Cl. 2, gives the President the power, by and with the consent of the Senate, "to make Treaties," with Indian Tribes. The "existence of federal power to regulate and protect the Indians and their property" is also implicit in the structure of the Constitution. *Board of County Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). "In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them * * * needing protection * * *. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation." *Ibid.* Thus, "[n]ot only does the Constitution expressly authorize Congress to regulate commerce with the

Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States * * * the power and the duty of exercising a fostering care and protection over all dependent Indian communities." *United States* v. *Sandoval*, 231 U.S. 28, 45-46 (1913); see *United States* v. *Kagama*, 118 U.S. 375, 384-385 (1886) ("From their [the Indians'] very weakness[,] so largely due to the course of dealing of the Federal Government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. * * * It must exist in that government, because it never has existed anywhere else, because the theatre of its exercise is within the geographical limits of the United States, because it has never been denied, and because it alone can enforce its laws on all the tribes."); see also Ordinance of 1787: The Northwest Territorial Government, Art. III, 1 Stat. 52 ("The utmost good faith shall always be observed towards the Indians.").

2. Congress's plenary power over Indian affairs necessarily encompasses broad authority to identify the communities that fall within the scope of that power. For example, even after this Court had concluded that the Pueblo people of New Mexico were too assimilated to constitute an Indian tribe within the meaning of the Intercourse Act, *United States* v. *Joseph*, 94 U.S. 614, 617-618 (1877), the Court nonetheless deferred to Congress's decision to recognize the Pueblos as Indian communities within the Indian affairs power. *Sandoval*, 231 U.S. at 47. The Court explained that "the legislative and executive branches of the Government have regarded and treated the Pueblos of New Mexico as dependent communities entitled to its aid and protection," and that, in light of their Indian lineage, common culture, and relative isolation from the rest of society, "this assertion of guardianship over them cannot be said to be arbitrary but must be regarded as both authorized and controlling." *Ibid.* Congress may not "bring a community or body of people

within the range of [its Indian affairs power] by arbitrarily calling them an Indian tribe." *Id.* at 46. As long as Congress rationally concludes that a community is "distinctly Indian," however, "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts." *Ibid.*

Congress's authority to aid Indian communities, moreover, extends to all such communities within the borders of the United States, "whether within its original territory or territory subsequently acquired." *Sandoval*, 231 U.S. at 46. Thus, despite differences in language, culture, religion, race, and community structure, Native people in the East, *Oneida Indian Nation* v. *County of Oneida*, 414 U.S. 661 (1974), the Plains, *Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867), the Southwest, *Sandoval*, *supra*, the Pacific Northwest, *Washington* v. *Yakima Indian Nation*, 439 U.S. 463 (1979), and Alaska, *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962), all fall within Congress's Indian affairs power.

3. The Court has always understood members of traditional Indian communities to share the same or a similar race. *Montoya* v. *United States*, 180 U.S. 261, 266 (1901); *Kagama*, 118 U.S. at 378; *United States* v. *Rogers*, 45 U.S. (4 How.) 567, 573 (1846); *Cherokee Nation* v. *Georgia*, 30 U.S. (5 Pet.) 1, 22 (1831). It has never suggested, however, that congressional legislation that fulfills the United States' unique obligations towards Indians constitutes discrimination on the basis of race.

In *Mancari*, the Court squarely held that distinctions based on the United States' unique trust relationship with indigenous people should not be equated with distinctions based on race that are prohibited by the Constitution. In that case, the Court upheld the constitutionality of a law extending a preference for employment in the Bureau of Indian Affairs (BIA) to members of federally recognized tribes who

have "one-fourth or more degree Indian blood." 417 U.S. at 553 n.24. The Court rested its decision on "the unique legal status of Indian tribes under federal law and upon the plenary power of Congress, based on a history of treaties and the assumption of a 'guardian-ward' status, to legislate on behalf of federally recognized Indian tribes." *Id.* at 551. The Court emphasized that if laws "designed to help only Indians were deemed invidious racial discrimination, an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." *Id.* at 552. Given that unique legal and historical context, the Court concluded that the Indian employment preference was not a "racial preference," because it "is granted to Indians not as a discrete racial group, but rather, as members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* at 553-554. More generally, the Court held that, "[a]s long as the special treatment [of Indians] can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. Because the BIA employment preference rationally served the "non-racial" goals of "further[ing] the cause of Indian self-government" and "mak[ing] the BIA more responsive to the needs of its constituent groups," it did not violate constitutional equal protection principles. *Id.* at 554.

Since *Mancari*, the Court has repeatedly reaffirmed that "federal regulation of Indian affairs is not based upon impermissible [racial] classifications." *United States* v. *Antelope*, 430 U.S. 641, 646 (1977). It is "governance of once-sovereign political communities; it is not to be viewed as legislation of a 'racial group consisting of Indians.'" *Ibid.* See also *Washington* v. *Fishing Vessel Ass'n*, 443 U.S. 658, 673 n.20 (1979); *Yakima Indian Nation*, 439 U.S. at 500-501; *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 85-90 (1977); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976);

Moe v. *Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 479-480 (1976).

B. Congress Has Rationally Identified Native Hawaiians As A Group Falling Within Its Indian Affairs Power

1. Congress long ago identified Native Hawaiians as an indigenous group falling within its Indian affairs power. In 1920, Congress enacted the Hawaiian Homes Commission Act (HHCA), ch. 42, 42 Stat. 108, which designated 200,000 acres of lands for homesteading by "Native Hawaiians." Congress has since enacted dozens of statutes that single out Native Hawaiians for special treatment. Congress has established special Native Hawaiian programs in the areas of health care, education, employment, and loans; it has enacted statutes to preserve Native Hawaiian culture, language, and historical sites; and it has classified Native Hawaiians as "Native Americans" under numerous other statutes, thereby extending to Native Hawaiians many of the same protections accorded to American Indians and Alaska Natives. See pp. 4-5, *supra*. Those enactments reflect Congress's view, expressly articulated in 1992, that "[t]he authority of the Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate in matters affecting the native peoples of * * * Hawaii." 42 U.S.C. 11701(17).

Congress's treatment of Hawaiians as a distinct indigenous people falling within its Indian affairs power is entirely rational. In the 1993 Joint Resolution and in recent federal statutes extending educational and health benefits to Native Hawaiians, Congress has found that: (1) Native Hawaiians are "a distinct and unique indigenous people with a historical continuity to the original inhabitants of the Hawaiian archipelago," 42 U.S.C. 11701(1); 20 U.S.C. 7902(1); (2) Native Hawaiians exercised sovereignty over the Hawaiian Islands, 20 U.S.C. 80q-14(11); (3) the overthrow of the Kingdom of

Hawaii was "illegal" and deprived Native Hawaiians of their right to "self-determination," 107 Stat. 1513; (4) the government installed after the overthrow ceded 1.8 million acres of land to the United States "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government," *id.* at 1512; (5) "the indigenous Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States," *ibid.*; and (6) "the Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language, and social institutions," *id.* at 1512-1513.

Those findings, none of which are challenged by petitioner, show that indigenous Hawaiians, like numerous tribes in the continental United States, have both historical and current bonds, as well as unrelinquished sovereignty and territorial claims. Also like tribes in the continental United States, Native Hawaiians, pursuant to Acts of Congress, have substantial lands set aside for their benefit—200,000 acres of Homestead Act land on which there are more than 6,800 leases to Native Hawaiians that furnish homes to an estimated 30,000 Hawaiians (See Hawaii Homes Comm'n, *et al.*, Amicus Br. 1), and a 20% interest in the income generated by 1.2 million acres of public trust lands under the Admission Act. Accordingly, Congress may enact special legislation on behalf of Native Hawaiians, as it may for their counterparts elsewhere in the United States. See *Sandoval*, 231 U.S. at 46-47.

2. Petitioner argues (Br. 39-45) that special legislation for indigenous Hawaiians falls outside Congress's Indian affairs power, because the indigenous Hawaiian community does not have a tribal government recognized by the Department of the Interior. See Federally Recognized Indian Tribe List Act of 1994, 25 U.S.C. 479a & note, 479a-1; 25 C.F.R. Pt.

83 (establishing criteria for Interior Department acknowledgment of tribal status). Congress, however, has repeatedly recognized Native Hawaiians as an indigenous group within its Indian affairs power, and the existence of a tribal government recognized by the Department of Interior is not a necessary predicate for the exercise by Congress itself of its unique power to fulfill the Nation's obligation toward indigenous people.

A requirement that there be a recognized tribal government would be particularly unjustified here The United States has concluded that it has a trust obligation to indigenous Hawaiians because it bears a responsibility for the destruction of their government and the unconsented and uncompensated taking of their lands. It would be extraordinarily ironic if the very reasons that the United States has a trust responsibility to the indigenous people of Hawaii served as an obstacle to the fulfillment of that responsibility. Fortunately, the Constitution is not so self-defeating. Congress may fulfill its trust responsibilities to indigenous peoples, whether or not they currently have a tribal government as such.

Petitioner attempts to locate a requirement of a present-day tribal government in the Indian Commerce Clause's use of the term "Tribe," and in this Court's decision in *Mancari*. See Br. 39-49. Neither provides a basis for so shackling Congress's ability to fulfill its trust responsibilities to those indigenous groups whose lands and sovereignty have been taken from them.

When the Constitution was adopted, the term "tribe" meant a "distinct body of people as divided by family or fortune, or any other characteristic." T. Sheridan, *A Complete Dictionary of the English Language* (2d ed. 1789); 2 S. Johnson, *A Dictionary of the English Language* (6th ed. 1785) (same). Thus, to the framers of the Constitution, an Indian tribe simply meant a distinct group of indigenous people set apart by their common circumstances. See also

Worcester, 31 U.S. (6 Pet.) at 559 (equating Indian tribe and Indian nation and defining "nation" as a "people distinct from others"); *id.* at 583 (Indians are "a separate and distinct people"). The Constitution does not limit Congress's Indian affairs power to groups with a particular government structure. "[S]ome bands of Indians, for example, had little or no tribal organization, while others * * * were highly organized." *Fishing Vessel Ass'n*, 443 U.S. at 664 (footnote omitted). Nor does the Constitution limit Congress's power to groups that continue to exercise all aspects of sovereignty. European "discovery" and the establishment of the United States necessarily diminished certain aspects of Indian sovereignty, *Johnson*, 21 U.S. (8 Wheat.) at 574; *Cherokee Nation*, 30 U.S. (5 Pet.) at 45, and the Constitution bestows on Congress "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess," *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 56 (1978). Thus, under the Constitution, "[f]ederal regulation of Indian tribes * * * is governance of once-sovereign political communities." *Antelope*, 430 U.S. at 646.

Because Congress found that Hawaiians have a direct historic, cultural, and land-based link to the indigenous people who inhabited and exercised sovereignty over the Hawaiian Islands before the first European contact in 1778, and that they are determined to preserve and to pass on to future generations their native lands and their distinct culture, Congress could reasonably determine that indigenous Hawaiians constitute an "Indian Tribe." Once Congress has determined that an Indian group or community has those characteristics, Congress "has a right to determine for itself when the guardianship which has been maintained over the Indian shall cease." *Tiger* v. *Western Inv. Co.*, 221 U.S. 286, 315 (1911).[5]

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[5] In several statutory contexts, Congress has used the term "tribe" in a narrower sense, distinguishing, for example, between a "tribe" and a

Moreover, the United States' authority over Indian affairs does not emanate from the Indian Commerce Clause alone. Congress would therefore retain ample authority to enact special measures on behalf of Native Hawaiians even if petitioner were correct that the Indian Commerce Clause may be invoked only if there is in existence a tribal government with which the United States may deal. This Court has held that the Constitution implicitly gives Congress plenary power to manage Indian affairs more generally. *Seber*, 318 U.S. at 715; *Sandoval*, 231 U.S. at 45-46; *Kagama*, 118 U.S. at 383- 384. That plenary power does not disintegrate when an indigenous people loses its government, particularly when the United States bears a responsibility for that loss.

In the first place, the loss of a particular form of government is not tantamount to termination of all sovereignty or of the prospect that sovereignty might be given expression in the future through governmental or other structures. In the case of Native Hawaiians, OHA itself furnishes a vehicle for the expression of self-determination over important aspects of Hawaiian affairs, and thus confirms that Native Hawaiians constitute a present-day "political" community.[6]

"band." See, *e.g.*, *Montoya*, 180 U.S. at 266; see also *United States* v. *Candelaria*, 271 U.S. 432, 442 (1926). As discussed above, however, the Constitution uses the term "Tribe" to refer to any distinct indigenous group.

[6] OHA's status as a state-law creation does not diminish its significance as a factor supporting the status of Native Hawaiians as a "Tribe" in the constitutional sense. A number of Tribes that have been formally recognized as such were effectively under state protection for much of their existence. See, *e.g.*, *United States* v. *Wright*, 53 F.2d 300, 303-304 (4th Cir. 1931) (Eastern Band of Cherokee Indians operated under state charter), cert. denied, 285 U.S. 539 (1932); 25 U.S.C. 734(a) (power of Texas to enact legislation benefitting Alabama and Coushatta Indian Tribes); 25 U.S.C. 1721(a)(9) (Passamaquoddy and Penobscot Tribes in Maine); see also *South Carolina* v. *Catawba Indian Tribe, Inc.*, 476 U.S. 498, 501 (1986); *New York ex rel. Cutler* v. *Dibble*, 62 U.S. (21 How.) 366 (1859).

That status is also confirmed by the existence of the myriad Native Hawaiian organizations (many of which have joined in or are described in amicus briefs in this case) that are active in a broad range of Native political, cultural, religious, legal, and land-related matters. Cf. 25 C.F.R. 83.7(c) (discussing political and comparable activity as a criterion for Interior Department acknowledgment). In any event, it is especially at the point at which an indigenous people have been deprived of their land and ability to govern themselves that the United States acquires a heightened trust responsibility to the indigenous people and their remaining institutions. See *Seber*, 318 U.S. at 715 (once the United States overcame the Indians and took possession of their lands, it "assumed the duty of furnishing * * * protection, and with it the authority to do all that was required to perform that obligation"); *Sandoval*, 231 U.S. at 45-46 (United States has "the power and the duty of exercising a fostering care and protection over all dependent Indian communities"); *Kagama*, 118 U.S. at 384 (through its course of dealings with Indian Tribes, the United States acquired a "duty of protection" for the "remnants" of once sovereign nations).

Nor does this Court's decision in *Mancari* call into question the constitutionality of legislation aimed at fulfilling that obligation. *Mancari* holds that an exercise of the Indian affairs power does not violate equal protection principles as long as "the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians." 417 U.S. at 555. Legislation that provides aid to a distinct indigenous community can satisfy that test, whether or not that community has a federally recognized tribal government. For example, when Congress enacted legislation in 1920 to return some land to indigenous Hawaiian people who were dying in the city so that they could resume their traditional way of life, there was no Hawaiian tribal government in existence. That legislation, however, was plainly tied to the fulfillment of Congress's unique obligation toward

the Indians. See *id.* at 555. The same is true of the many other federal statutes that address the distinct needs of the indigenous Hawaiian people. See pp. 4-5, 16-17, *supra*.

Petitioner emphasizes (Br. 39) that the particular preference approved in *Mancari* extends only to members of federally recognized tribes, making the preference "political" rather than "racial." See 417 U.S. at 553 n.24. The Court did not suggest, however, that the absence of a federally recognized tribal *government* automatically makes legislation designed to fulfill Congress's unique obligation to Indians "racial," and any such argument would be untenable. The Court explained in *Mancari* that the limitation of the preference to members of federally recognized tribes operated to exclude many individuals who might racially be classified as "Indians," and that "[i]n this sense, the preference is political rather than racial in nature." *Ibid.* The same is true here. The definition of "Hawaiian" for purposes of voting eligibility—descendants of the Native people who occupied the Hawaiian Islands in 1778—similarly excludes many people who might be classified as the same race (*i.e.*, Polynesian), but who came to the Hawaiian Islands after European discovery. The classification is therefore "political" in the same sense as in *Mancari*: it turns on the political event of discovery by Europeans in 1778, followed by recognition by the political Branches of the descendants of the aboriginal people of Hawaii as a distinct indigenous community deserving of protection. Congress does not extend benefits and services to Native Hawaiians because of their race, but because of their unique status as the indigenous people of a once-sovereign nation as to whom the United States has a recognized trust responsibility. Such legislation is just as non-racial as the legislation upheld in *Mancari*.

3. This Court's decisions subsequent to *Mancari* confirm that a federally recognized tribal government is not a predicate for legislation on behalf of indigenous people. For example, in *United States* v. *John*, 437 U.S. 634 (1978), the

Court upheld the power of Congress to provide for a group of Mississippi Choctaw Indians that did not have a federally recognized tribal government. The United States had entered into a treaty under which the Choctaw Indians would leave Mississippi by 1833. *Id.* at 641. In the 1890s, however, the United States became aware that a group of Choctaws had not left Mississippi. *Id.* at 643. Even though the United States did not regard that remaining group as members of a federally recognized tribe, *id.* at 650 n.20, it began to provide services and land to individual Choctaws in Mississippi. *Id.* at 644. In 1939, Congress declared that the lands that had been purchased for individual Choctaws would be held in trust for Choctaw Indians of one-half or more Indian blood, resident in Mississippi, and in 1944, Congress made those lands a reservation. *Id.* at 646. Finally, in 1945, Mississippi Choctaws of one-half or more Indian blood adopted a constitution and bylaws, which were then approved by the appropriate federal officials. *Ibid.*

Against that background, Mississippi argued that Congress lacked constitutional authority to establish federal criminal jurisdiction in the Choctaw Reservation. *John*, 437 U.S. at 652. The Court rejected that argument, explaining:

> [I]n view of the elaborate history * * * of relations between the Mississippi Choctaws and the United States, we do not agree that Congress and the Executive Branch have less power to deal with the affairs of the Mississippi Choctaws than with the affairs of other Indian groups. Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them.

Id. at 652-653.

The decision in *Weeks*, *supra*, similarly refutes petitioner's argument that Congress's Indian affairs power extends only

to members of federally recognized tribes. In that case, the Court upheld a statutory scheme to provide financial benefits to descendants of members of the Delaware Tribe. Although the Court recognized that beneficiaries included non-tribal Indians, 430 U.S. at 82 n.14, 84-85, that feature of the scheme did not alter the Court's view of the appropriate level of scrutiny required by the Constitution. The Court applied the standard set forth in *Mancari*, and upheld the distribution scheme on that basis. *Id.* at 85.

Weeks thus reaffirms that federal legislation governing Indian affairs is constitutional if rationally related to Congress's unique obligation to Indians, whether or not the beneficiaries are, at that time, members of federally recognized tribes. Other cases and federal statutes reflect that same understanding. *Menominee Tribe* v. *United States*, 391 U.S. 404, 410-413 (1968) (members of terminated tribe retain hunting and fishing rights); *Seber*, 318 U.S. at 716-718 (Congress has authority to allot land to individual Indians with special protections against alienation and exemption from state taxation); *United States* v. *McGowan*, 302 U.S. 535, 537, 539 (1938) (Congress established Reno Indian Colony for needy Indians scattered throughout the State); *Taylor* v. *Brown*, 147 U.S. 640 (1893) (Indians who sever relations with their tribe are eligible to receive protected land); Indian Health Care Improvement Act, 25 U.S.C. 1603(c) (extending health care services to members of terminated tribes); Indian Reorganization Act, 25 U.S.C. 461 *et seq.* (authorizing Secretary of Interior to extend federal recognition to Indian tribes that had previously lost federally recognized status); 25 U.S.C. 903-903f (restoring federal recognition to the Menominee Tribe of Wisconsin); 25 U.S.C. 651 (defining "Indians of California" eligible for distribution fund as "all Indians who were residing in the State of California on June 1, 1852, and their descendants now living in said State").

4. Petitioner's additional grounds for viewing legislation for indigenous Hawaiians as racial and outside Congress's Indian affairs power are also without merit. Petitioner contends (Br. 26-27) that such programs are racial because no similar benefits are extended to the descendants of non-Hawaiians who were citizens of Hawaii when the Hawaiian government was overthrown. But those who came to Hawaii after 1778—whether European, Asian, or Polynesian —have no aboriginal claim to sovereignty or land. Laws that distinguish between a distinct indigenous group, as to whom Congress has undertaken a trust responsibility, and subsequent inhabitants do not make a distinction based on race.

The distinction between indigenous people and subsequent inhabitants has uniformly been respected in federal law. Following the national expansion resulting from the Louisiana Purchase, the federal government undertook trust obligations toward the Indians but not to the French settlers of the region. When the United States purchased Alaska, the United States recognized that it had special obligations to the Native Alaskans but not to the inhabitants of Russian and other descent. In annexing the Hawaiian Islands, Congress recognized its trust obligations to Native Hawaiians. Those obligations do not extend to the non-indigenous inhabitants of Hawaii.

Furthermore, by the time Congress formally annexed Hawaii in 1898, the presence of non-natives (including many Americans) had already caused widespread harm to Native Hawaiians. Congress could reasonably conclude that the United States, through annexation, succeeded to an obligation to account for the consequences of that pre-annexation experience, just as the United States recognized the consequences of England's dealings with the Indians prior to the independence of the United States, see *Johnson* v. *M'Intosh*, *supra*, and Spain's dealings with the Indians prior to the United States' acquisition of territory once held by Spain, see *United States* v. *Candelaria*, *supra*.

Nor does it matter (Pet. Br. 42-43) that Native Hawaiians came into the federal union as citizens. "Citizenship is not incompatible with tribal existence or continued guardianship, and so may be conferred without * * * placing [Indians] beyond the reach of congressional regulations adopted for their protection." *United States* v. *Nice*, 241 U.S. 591, 598 (1916); see *Sandoval*, 231 U.S. at 48 (citing cases). If the rule were otherwise, Congress would have been deprived of all power over Indian affairs in 1924 when all Indians were granted citizenship. See Act of June 2, 1924, ch. 233, 43 Stat. 253.

Thus, Congress has no less authority under its Indian affairs power to enact legislation for the benefit of Native Hawaiians than it has to enact legislation for the benefit of other distinct indigenous groups as to whom it has undertaken a trust responsibility. Such legislation is constitutional as long as it is rationally tied to the fulfillment of Congress's unique obligation toward indigenous Hawaiians. *Mancari*, 417 U.S. at 555.[7]

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[7] Petitioner relies (Br. 41-42) on memoranda prepared by the Office of Legal Counsel in the Department of Justice, as support for his view that the federal government's special relationship with Indians is limited to members of federally recognized tribes. The cited memoranda, however, do no more than note that federal regulation of Indian affairs is based on a classification that is political and not racial in nature; they do not purport to answer the question whether Native Hawaiians qualify for treatment similar to that accorded to other indigenous peoples. While the Department of Justice has from time to time taken different views of that question, see Letter from Andrew Fois, Assistant Attorney Gen., Office of Legislative Affairs, to Hon. Nancy Kassenbaum, Chairwoman, Senate Comm. on Labor and Human Resources (Jan. 11. 1996), it has most recently taken the position that the question is an open one. Letter from L. Anthony Sutin, Acting Assistant Attorney Gen., Office of Legislative Affairs, to Hon. Ben Nighthorse Campbell, Chairman, Senate Comm. on Indian Affairs (July 16, 1998); see also Letter from Christopher H. Schroder, Acting Assistant Attorney Gen., Office of Legal Counsel, to Jamison S. Borek, Deputy Legal Adviser, U.S. Dep't of State (Nov. 1, 1996).

C. Hawaii's Voting Requirement Is Authorized By Federal Law And Is Rationally Tied To The Fulfillment Of The United States' Obligation To Indigenous Hawaiians

1. While the voting restriction at issue was adopted by Hawaii, rather than the federal government, that does not alter the constitutional analysis in this case. As a general matter, the "States do not enjoy [the] same unique relationship with Indians" as the federal government. *Yakima Indian Nation*, 439 U.S. at 501. When Congress delegates authority to a State to administer the federal trust responsibility to indigenous people, however, state legislation that is within the scope of that authority is subject to the same constitutional analysis as legislation enacted by Congress itself. *Ibid.*[8] Hawaii has acted under such a delegation of authority here.

In the Hawaii Admission Act, Congress directed the State to hold 1.2 million acres of land in trust and to use the income generated from the land for one of five purposes, including "the betterment of the conditions of native Hawaiians." § 5(f), 73 Stat. 6. Congress has also authorized the State to administer the federal trust "in such a manner" as the State's constitution and laws provide. *Ibid.* The Admission Act therefore conveys broad authority to the State to use the trust funds from the ceded lands in any manner that serves the interests of Native Hawaiians.

The State's decisions to allocate 20% of the fund to programs for Native Hawaiians and to create an Office of Hawaiian Affairs to administer those programs unquestionably

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[8] This case does not present the separate question that might be raised by state laws with respect to Indians that were passed in the absence of congressional authorization. Compare n. 6, *supra*, with *Three Affiliated Tribes* v. *Wold Eng'g*, 467 U.S. 138, 157 (1984).

fall within the scope of the State's authority to operate the land trust "for the betterment of the conditions of native Hawaiians," "in such a manner" as the State may provide. Indeed, as the court of appeals noted (Pet. App. 9a), petitioner has not challenged either decision.

Giving indigenous Hawaiians the right to choose the officials who will operate the trust for their betterment similarly fits within the Admission Act's wide grant of authority. Such an election scheme "better[s] * * * the conditions of native Hawaiians" in two distinct, but complementary ways: it both promotes self-determination by indigenous Hawaiians and helps to ensure that OHA will administer the trust in a way that is responsive to their interests. Those are precisely the reasons the State had for granting to indigenous Hawaiians the right to elect OHA officials. J.A. 39 ("people to whom assets belong should have control over them"); J.A. 53 (election of OHA officials by indigenous Hawaiians would promote "self-determination and self-government"); J.A. 39 ("a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles"); J.A. 40 (trust beneficiaries "would best protect their own rights").

The State's determination that it serves Native Hawaiian interests to allow them to choose the OHA trustees comports with the longstanding congressional commitment to Indian self-determination. In the Indian Self-Determination Act of 1974, which was enacted before Hawaii amended its Constitution to establish OHA, Congress expressed "its commitment to * * * a meaningful Indian self-determination policy which will permit an orderly transition from the Federal domination of programs for, and services to, Indians to effective and meaningful participation by the Indian people in the planning, conduct, and administration of those programs and services." 25 U.S.C. 450a(b). The federal government frequently oversees elections for tribal

governments in which only tribal members may vote. See, *e.g.*, 25 U.S.C. 476, 478, 677e. Hawaii's election law furthers the same self-determination purpose as those federally supervised tribal elections.

The Hawaii election law also bears a resemblance to the BIA employment preference upheld in *Mancari*. The Court upheld that preference because it rationally served the "non-racial" goals of "further[ing] the cause of Indian self-government" and "mak[ing] the [agency] more responsive to the needs of its constituent groups," 417 U.S. at 554—the same two goals that are served by the OHA election law. The difference between the OHA election law and the employment preference upheld in *Mancari* is that the OHA election law serves the interests of self-determination and accountability more directly. Instead of placing power and influence in the hands of the particular individuals selected for employment, it places power and influence in the hands of the trust beneficiaries as a whole. The OHA election law therefore falls squarely within the Admission Act's broad grant of authority to "better[] * * * the conditions of native Hawaiians." § 5(f), 73 Stat. 6.

Congress has also implicitly ratified the OHA election structure. Congress has specifically found that OHA "serves and represents the interests of Native Hawaiians," that OHA "has as a primary and stated purpose the provision of services to Native Hawaiians," 16 U.S.C. 470w(18), and that OHA has "expertise in Native Hawaiian affairs," 20 U.S.C. 80q-11(a)(2). See also 25 U.S.C. 3001(11). Congress has also expressly authorized OHA to administer several programs for Native Hawaiians. 20 U.S.C. 4441(c)(2)(B), 7904(b)(3) and (f); 42 U.S.C. 2991b-1(a), 11711(7)(A)(ii). Those congressional actions reflect a clear approval of OHA's election structure. See S. Rep. No. 580, *supra*, at 32 (finding that the election of OHA trustees by Native Hawaiians represents "a

rational means of effectuating the state's obligations under the trust relationship to Native Hawaiians").[9]

2. Because the OHA election law is authorized by Congress, it is subject to the same standard of review as legislation enacted by Congress that singles out a distinct indigenous group for favorable treatment: it is constitutional as long as it is rationally tied to the fulfillment of Congress's unique trust obligation to Indians. *Mancari*, 417 U.S. at 555. The OHA election law readily satisfies that standard. As discussed above, that law promotes self-determination by indigenous Hawaiians, and it helps to ensure that OHA administers the unchallenged trusts in a way that is sensitive to the interests of the trusts' sole beneficiaries. Petitioner's exclusion from the class of persons eligible to vote for OHA is based on the State's entirely legitimate desire to further those two "non-racial" goals, *id.* at 554, not on petitioner's race. Petitioner's Fourteenth and Fifteenth Amendment challenges to the OHA election law should therefore be rejected.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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[9] Petitioner argues (Pet. 21) that the election law falls outside the grant of authority in the Admission Act, because it extends voting rights to all descendants of indigenous Hawaiians, not just those with 50% or more blood quantum. OHA administers a separate trust responsibility for all indigenous Hawaiians, however, and in adopting that more inclusive definition, Hawaii was simply following congressional policy. In all programs for the benefit of Native Hawaiians enacted since 1974, Congress has defined Native Hawaiians to include all descendants of indigenous Hawaiians, not just those with 50% or more blood quantum. See p. 6, *supra*. Moreover, all the programs that Congress has authorized OHA to administer provide benefits to all descendants of indigenous Hawaiians. 20 U.S.C. 4441(c)(2)(B), 7904(b)(3) and (f); 42 U.S.C. 2991b-1(a), 11711(7)(A)(ii).

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No. 98-818

In the

Supreme Court of the United States

October Term, 1998

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO,
Governor of the State of Hawaii,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37, Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of Petitioner, Harold F. Rice. Written consent to the filing of this brief has been granted by counsel for all parties. Copies of the letters of consent have been lodged with the Clerk of this Court.[1]

PLF is a nonprofit, tax-exempt corporation organized under the laws of the State of California for the purpose of engaging in litigation in matters affecting the public interest. PLF has participated in numerous cases involving issues arising under the Fifth and Fourteenth Amendments to the United States Constitution. Amicus believes the lower court's opinion poses a serious threat to the heretofore absolute right to vote without regard to race.

The lower court's opinion additionally sets aside this Court's long-held doctrine that legislative schemes granting benefits and rights based upon race are inherently suspect and will be upheld only upon the most searching scrutiny. The lower court's opinion would legitimize government conduct granting special rights to a racial group, so long as government claimed that such treatment was based upon a "special" or "political" relationship with the benefited group. The lower court's opinion is in serious conflict with the decisions of this Court, and must be overturned.

OPINION BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 146 F.3d 1075 (9th Cir. 1998). The

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[1] Pursuant to Supreme Court Rule 37.6, PLF represents that no counsel for a party authored this brief in whole or in part, and that no monetary contribution to the preparation or submission of this brief was made by any person or entity.

opinion of the district court is reported at 963 F. Supp. 1547 (D. Haw. 1997).

STATEMENT OF THE CASE

This case presents two issues: (1) whether the wording of the Fifteenth Amendment means what it says and absolutely prohibits restriction of the franchise in all elections, notwithstanding the asserted justification for the discrimination; and (2) whether a state can insulate its actions from strict scrutiny review by declaring that its relationship with a benefited racial group is based on a "political" or "special trust" relationship alleged to be similar to that which exists between the United States and federally recognized Indian Tribes.

The case arises out of Petitioner's attempt to register to vote in an election for the trustees of the Office of Hawaiian Affairs (OHA). His registration was denied on the grounds that he was not a "Hawaiian" or "native Hawaiian."[2] The denial was based on Article XII, Section 5, of the Hawaii Constitution, which provides that "[t]here shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are

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[2] As used in this brief and as defined by the relevant statutes, "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii," and "native Hawaiian" means

> any descendant of not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778, as defined by the Hawaii Homes Commission Act, 1920, as amended; provided that the term identically refers to the descendants of such blood quantum aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778 and which peoples thereafter continued to reside in Hawaii.

Haw. Rev. Stat. § 10-2.

Hawaiians, as provided by law," and Hawaii Revised Statute § 13D-3(b), which implements it by providing that

> [n]o person shall be eligible to register as a voter for the election of board members unless that person meets the following qualification: (1) The person is Hawaiian.

Petitioner filed suit in the United States District Court for the District of Hawaii, alleging that he had been denied his right to vote on the basis of race, in violation of the Fourteenth and Fifteenth Amendments to the United States Constitution.

On May 6, 1997, summary judgment was entered against Petitioner on his claims. The district court's opinion was affirmed by the Ninth Circuit Court of Appeals. The court of appeals agreed that "there is a racial classification on the face of § 13D-3, and that it is suspect as such." *Rice v. Cayetano*, 146 F.3d at 1082. Nevertheless, relying on *Salyer Land Co. v. Tulare Lake Basin Water Storage District*, 410 U.S. 719 (1973), it upheld the classification as a rational restriction limiting eligible voters in a "special purpose" election to those most affected. The Court also concluded that the franchise was constitutionally permissible because it restricted voting to an essentially "political" class, relying on the rationale of *Morton v. Mancari*, 417 U.S. 535 (1974), and assuming that the State of Hawaii had a "trust relationship" with Hawaiians and native Hawaiians similar to that which exists between the United States and Indian tribes. *Rice v. Cayetano*, 146 F.3d at 1081.

In order to understand more clearly the issues in this appeal, one must first consider the history which led up to the creation of OHA. In 1810, King Kamehameha I unified the Hawaiian Islands into a monarchical government under his control. He, and later two of his sons who followed him on the throne as Kamehameha II and Kamehameha III, had absolute ownership of all land in the Kingdom, subject to a feudal tenure by various chiefs who owed allegiance to the King and held their land at his

pleasure. *Kalipi v. Hawaiian Trust Co.*, 66 Haw. 1, 656 P.2d 745 (1982).

In the late 1840s, King Kamehameha III transformed the traditional feudal landholding system into a system of fee ownership based on western law. As a result of this "*mahele*," or division, the King controlled 24% of the land as his personal property (these lands were later referred to as "Crown Lands"). Thirty-six percent of the land was conveyed to the Hawaiian Government, and 39% was conveyed to various chiefs. Although the common people were allowed to claim the land on which they lived and cultivated, the amount of land actually granted to the common people amounted to less than 1% of the total. Neil M. Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 854-58 (1975).

By the time of the overthrow of the Kingdom of Hawaii in 1893, Hawaiians and native Hawaiians comprised a minority of the inhabitants of the Islands. A majority of the inhabitants were nonnative Hawaiians; many of them were born in Hawaii, and many were citizens of the Kingdom. *See* Hawaiian Almanac and Annual for 1893, at 11, 14 (1892); Russ Apple & Peg Apple, Land, Lili`uokalani, and Annexation, 127-30 (1968). The Kingdom was replaced by a provisional government (succeeded by the Republic of Hawaii), which sought annexation of the Islands by the United States.

Hawaii was annexed by the United States in 1898. As part of annexation, the Republic of Hawaii ceded the government and former Crown lands to the United States. The Newlands Resolution, Act of July 7, 1898, 30 Stat. 750, which implemented annexation, provided that the revenues from the ceded lands "shall be used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes."

In 1920, Congress enacted the Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108 (1921) (HHCA). The HHCA set aside approximately 200,000 acres of

ceded lands as "available lands" which would be leased for homestead purposes to "native Hawaiians," defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA § 201(7).

Hawaii became a state in 1959. As a condition of admission, Hawaii agreed to adopt the HHCA as part of the Hawaii Constitution. Hawaii Admission Act, Pub. L. No. 86-3, 73 Stat. 4 (1959), at § 4. Most of the ceded lands were reconveyed to the State of Hawaii pursuant to Section 5(b) of the Hawaii Admission Act. Section 5(f) of the Act provided that the ceded lands, together with the proceeds and income therefrom, were to be held by the state as a public trust for five purposes: (1) the support of the public schools and other public educational institutions; (2) for the betterment of the conditions of native Hawaiians, as defined in the HHCA; (3) for the development of farm and home ownership on as widespread a basis as possible; (4) for the making of public improvements; and (5) for the provision of lands for public use. Section 5(f) gives the State of Hawaii discretion to use the ceded lands for any "one or more of the foregoing purposes."

Until the creation of OHA, the only ceded lands used "for the betterment of conditions of native Hawaiians" were the "available lands" set aside under the HHCA.

The State of Hawaii devoted most of the ceded land income and proceeds to funding the programs of the Hawaii State Department of Education. *See* 80-8 Haw. Att'y Gen. Op., 1980 WL 26216 (July 8, 1980).

OHA was created as a state agency pursuant to a proposal of the 1978 Hawaii Constitutional Convention which was ratified as Article XII, Section 5, of the State Constitution. Article XII, Section 5, provided that OHA

> shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be

> held in trust for native Hawaiians and Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians, as provided by law. The board members shall be Hawaiians.

Article XII, Section 5, and related amendments to the Hawaii Constitution enacted as a result of the 1978 Constitutional Convention fundamentally changed treatment of the ceded lands under State law. Although, previously, only that portion of the ceded lands set aside for the HHCA was utilized for the betterment of native Hawaiians, Article XII, Section 4, now provided that all of the ceded lands, excluding only the HHCA "available lands," "shall be held by the State as a public trust for native Hawaiians and the general public." Article XII, Section 6, provided that OHA would receive income and proceeds from a "pro rata" portion of the ceded lands, later defined by statute as "twenty percent of all revenue derived from the public land trust." Haw. Rev. Stat. § 10-13.5. The effect of the constitutional amendments was to give native Hawaiians, through the vehicle of OHA, a state-created undivided trust right in *all* of the ceded lands, *plus* exclusive rights in that portion of the ceded lands set aside for purposes of the HHCA. *Cf.*, Conference Committee Report No. 77, 1979 Haw. Sen. J. at 998 (describing reinterpretation of Section 5(f) by 1978 Constitutional Convention to create trust rights in favor of na'ive Hawaiians in all ceded lands).

The election by which the 1978 proposed amendments were ratified was challenged in Hawaii's courts, on the ground, *inter alia*, that the voters had not been adequately informed on the proposed amendments. The Hawaii Supreme Court agreed, and voided the ratification of a number of the amendments, including the amendment which defined the terms "Hawaiian" and "native Hawaiian" as used with regard to OHA in Article XII of the Hawaii Constitution. *Kahalekai v. Doi*, 60 Haw. 325, 342, 590 P.2d 543, 555 (1979); *see also* revisor's Note, Haw. Rev.

Stat. Vol. I at 163. Hawaii's highest court concluded that the electorate had never validly ratified the racial restrictions relating to OHA, the Legislature nevertheless enacted Haw. Rev. Stat. chs. 10 and 13, which statutorily created the racial classifications and exclusions at issue here.

In addition to managing numerous programs which expend public funds for Hawaiians and native Hawaiians, *see* programs listed in OHA's web-page at "http://www.oha.org" and "http://planet-hawaii.com/oha," OHA also secures private benefits for its beneficiaries. Among other things, upon satisfactory completion of an application form showing that the applicant possesses Hawaiian blood, OHA issues the applicant an "Operation 'Ohana" card which evidences the beneficiary's Hawaiian race and entitles the holder to monetary discounts from participating private vendors of goods and services, including providers of public accommodations. *See, e.g., Ka Nuleka 'Ohana*, May, 1995, reporting that "[m]ore and more businesses are offering discounts at the flash of your Operation 'Ohana card," and listing new participating merchants including Hawaiian Vacation Retreats, a "luxury bed and breakfast vacation rental."

SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides that the right of United States citizens to vote shall not be abridged on the basis of race, color, or previous condition of servitude. The express wording of the Amendment leaves no room for conditioning the right to vote on the basis of race, no matter what rationale may be put forward to justify such a restriction.

This Court's opinion in *Salyer Land* does not apply in the instant action. The issue in *Salyer* was whether an election process restricting voting in a water district based on land ownership violated the "one-man, one-vote" principle enunciated in *Reynolds v. Sims*, 377 U.S. 533 (1964). Nothing in *Salyer*

Land indicates that the express provisions of the Fifteenth Amendment can be abrogated by declaring that an election conditioned on race is a "special purpose" election.

Nor does the racial restriction meet constitutional muster under the Fourteenth Amendment. Hawaiians and native Hawaiians are not "Indian Tribes" within the meaning of the Constitution, but are groups defined purely by reference to race. The rational basis review which this Court held applies to federal legislation affecting Indian Tribes must be strictly confined to those political entities which have received formal recognition as an Indian Tribe by the United States.

Affirmance of the Ninth Circuit's rationale for upholding a racially restricted election would have an extremely pernicious effect. Allowing a state to circumvent strict scrutiny review of legislation preferring a racial group by the simple expedient of declaring the group is a state equivalent of an Indian Tribe would create great mischief, and over time lead to wholesale racial balkanization.

ARGUMENT

I

THE FIFTEENTH AMENDMENT PROHIBITS ANY AND ALL RESTRICTIONS ON THE RIGHT TO VOTE BASED ON RACE, INCLUDING THE EXPRESS RACIAL LIMITATION ESTABLISHED BY THE OHA FRANCHISE

A. The Fifteenth Amendment Prohibits States from Denying or Abridging the Right to Vote Based on Race

The Fifteenth Amendment to the United States Constitution provides, in pertinent part:

> The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude.

The right to vote has been declared fundamental by this Court, a right which is guaranteed to all citizens by the Fifteenth Amendment:

> "The right to vote freely for the candidate of one's choice is of the essence of a democratic society. . . ." *Reynolds v. Sims*, 377 U.S. at 555. For much of our Nation's history, that right sadly has been denied to many because of race. The Fifteenth Amendment, ratified in 1870 after a bloody Civil War, promised unequivocally that "[t]he right of citizens of the United States to vote" no longer would be "denied or abridged . . . by any State on account of race, color, or previous condition or servitude."

Shaw v. Reno, 509 U.S. 630, 639 (1993).

The Fifteenth Amendment is self-executing. *South Carolina v. Katzenbach*, 382 U.S. 967 (1966). It is absolute on its face, and permits no justification of denial or abridgment of the franchise on racial grounds. It "squarely prohibits racially-based denials of the right to vote," Laurence H. Tribe, *American Constitutional Law*, at 335 n.2 (2d ed. 1988), and renders inoperative any provision of a state constitution that restricts the right to suffrage to members of a particular race. *Neal v. Delaware*, 103 U.S. 370, 389 (1881).

In order to evade its express prohibition of racial qualifications for voting, a number of states that "refused to take no for an answer" tried to circumvent the amendment by implementing various tests and devices to limit the franchise. Blumstein, *Defining and Proving Race Discrimination: Perspectives on the Purpose v. Results Approach from the Voting Rights Act*, 69 Va. L. Rev. 633, 637 (1983). These included ostensibly race-neutral devices such as literacy tests with "grandfather clauses" and "good character" provisos, as well as racial gerrymanders. *Shaw*, 509 U.S. at 639-40.

Gomillion v. Lightfoot, 364 U.S. 339 (1960), illustrates the scope of the Fifteenth Amendment's prohibition of racially restrictive voting. At issue was an alleged attempt by the State of Alabama to define the boundaries of the City of Tuskegee so as to exclude Negro voters:

> The essential inevitable effect of this redefinition of Tuskegee's boundaries is to remove from the city all save four or five of its 400 Negro voters while not removing a single white voter or resident. The result of the Act is to deprive the Negro petitioners discriminatorily of the benefits of residence in Tuskegee, including, *inter alia*, the right to vote in municipal elections.

364 U.S. at 341. The Court stated that, if plaintiffs' allegations were proven at trial,

> the conclusion would be irresistible, tantamount for all practical purposes to a mathematical demonstration, that the legislation is solely concerned with segregating white and colored voters by fencing Negro citizens out of town so as to deprive them of their pre-existing municipal vote.

Id. Even though the racial redefinition was not expressly racial, the Court took notice of its actual effect and stated that "'[t]he [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination.'" 364 U.S. at 342 (quoting from *Lane v. Wilson*, 307 U.S. 268, 275 (1939)).

In contrast, the racial nature of the OHA franchise is apparent on the face of the statute. Unlike the more sophisticated tests and devices once utilized by other states, the racial restriction here is facial and blatant. Amicus contends that such a racial restriction contradicts the clear meaning of the Fifteenth Amendment and is, therefore, impermissible and void.

B. The OHA Elections Are Elections of "Public Officials" to Which the Requirements of the Fifteenth Amendment Apply

The Fifteenth Amendment applies to all elections of public officials: "Clearly, the [Fifteenth] Amendment includes *any election* in which public issues are decided or public officials selected." *Terry v. Adams*, 345 U.S. 461, 468 (1953) (emphasis added). The Court confirmed this in *Chisom v. Roemer*, 501 U.S. 380 (1991), which concerned Section 2 of the Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (1965). The version of Section 2 before the Court mandated that

> [n]o voting qualification or prerequisite to voting . . . shall be imposed or applied by any State or political subdivision to deny or abridge the right . . . to vote on account of race or color.

The Court held that Section 2 did not make any distinctions or impose any limitation "as to which elections would fall within its purview," 501 U.S. at 392, and was "unquestionably coextensive with the coverage provided by the Fifteenth Amendment." *Id.*

There can be no dispute that the OHA Trustees are public officials. For example, they receive a salary which is paid out of revenues from the State's ceded lands, and are "included in any benefit program generally applicable to officers and employees of the State except for benefit programs relating to retirements." Haw. Rev. Stat. § 10-9. The trustees have also previously taken the position in the federal courts that they are officers of the State. *See Price v. Akaka*, 928 F.2d 824, 828 (9th Cir. 1990) (claim of Eleventh Amendment immunity); *Price v. Akaka*, 3 F.3d 1220, 1221 (9th Cir. 1993) (upholding trustees' claim of qualified immunity as public officials).

The State has defended its racial limitation on the ground that the OHA elections are "special purpose" elections such as

the limited franchise elections upheld by this Court in *Salyer Land Co. v. Tulare Water District*, 397 U.S. 719, and *Ball v. James*, 451 U.S. 355 (1981). This ignores the fact that the proposed constitutional provisions restricting OHA racially were not validly ratified by the electorate, nor would they be constitutional if they were. Further, nothing in those cases can be read for the proposition that restricting the franchise to a single race would be a valid "special purpose" election which would avoid the requirements of the Fifteenth Amendment. Indeed, neither the Fifteenth Amendment nor a limited racial franchise were at issue in those cases. Instead, the Court considered whether a nonracial limitation would violate the "one man, one vote" requirement of the Fourteenth Amendment enunciated by the Court in *Reynolds v. Sims*, 377 U.S. 533. The Court indicated that

> there might be some case[s] in which a State elects certain functionaries whose duties are so far removed from normal governmental activities and so disproportionately affect different groups that a popular election in compliance with *Reynolds* . . . might not be required.

Ball v. James, 451 U.S. at 363.

Thus, in *Ball* the Court upheld the constitutionality of an Arizona election process which limited voting for directors of an agricultural and power district to landowners, and apportioned voting power according to the area of land owned by each landowners. This Court held that the district's purpose was sufficiently narrow and specialized and its activities affected the landowners so disproportionately as to exempt it from the one-man, one-vote rule. *Id.* at 370-71.

Similarly, in *Salyer Land* the Court upheld a California election system which restricted voting for directors of a water district based on land ownership. In so doing, the Court pointed

to the facts that the water district had relatively limited government authority, the district's primary purpose was to provide for the acquisition, storage, and distribution of water for farming in the Tulare Lake Basin, and the district's actions disproportionately affected landowners. 410 U.S. at 728-30.

Again, however, there was absolutely no intimation by the Court in those cases that a state could similarly limit the franchise on the basis of race by claiming that the elections disproportionately concern members of a specific race. Moreover, an examination of OHA quickly reveals that it is not the type of limited-purpose organization described in *Ball* and *Salyer*.

Most importantly, OHA is given a 20% share of the revenues from the ceded lands trust. The Hawaii Constitution provides that the beneficiaries of the ceded lands are both native Hawaiians and the general public:

> The lands granted to the State of Hawaii by Section 5(b) of the Admission Act and pursuant to Article XVI, Section 7, of the State Constitution, excluding therefrom lands defined as "available lands" by Section 203 of the Hawaiian Homes Commission Act, 1920, as amended, shall be held by the State as a public trust for native Hawaiians *and the general public*.

Haw. Const., art. XII, § 4 (emphasis added). In addition, OHA receives legislative appropriations from general tax revenues. *See* Respondent's Brief in Opposition to Petition for Certiorari at 28-29. As a result, OHA recently reported to its beneficiaries that as of February 28, 1999, it held cash and investment assets of $336,718,196. OHA Financial Report, *Ka Wai Ola o Oha*, Apr. 1999.

OHA has an immense impact on Hawaii taxpayers and the economy by its claim to 20% of the public revenues from the ceded lands. This has led to protracted litigation in state courts between OHA and the State over additional amounts, which OHA argues the State has failed to pay. The dispute is presently pending decision in the Hawaii Supreme Court, which has delayed issuing a ruling to allow the parties time to reach a potential settlement.

On April 27, 1999, the *Honolulu Advertiser* reported that, in response to a prior State offer to settle the claims for $251 million, OHA negotiators had extended a counteroffer in the amount of $304 million, plus 200,000 acres of land from the ceded lands trust. The monetary payment includes $56.6 million dollars from rent paid to the State by lessee DFS Waikiki; $31.8 million for revenues from land under Hilo Hospital's patient and cafeteria services; $12.9 million from rent from land used for low- and moderate-income housing projects by the Hawaii Housing Authority and Housing Finance and Development Corporation, and $123.3 million in interest on money allegedly owed to OHA from these projects. Yasmin Anwar, *Ceded Land Proposal Strongly Criticized,* Honolulu Advertiser, Apr. 27, 1999, at A-1, A-8. The next day, however, OHA's offer was withdrawn by OHA's Board of Trustees as inadequate, and OHA broke off negotiations. Yasmin Anwar, *OHA Cuts Off Talks with State Over Ceded Lands*, Honolulu Advertiser, Apr. 28, 1999, at A-1, A-8. Depending upon how the amounts are calculated, potential liability for the State and its taxpayers is estimated as between $450 million and $1.2 billion. *Id.*

These factors alone fundamentally distinguish OHA from the limited purpose entity in *Salyer,* where the Court emphasized "[a]ll of the costs of district projects [were] assessed against land by assessors in proportion to the benefits received" and that because general tax dollars were not used, "there is no way that

the economic burdens of district operations can fall on residents *qua* residents." 410 U.S. at 729. Further, OHA possesses broad governmental powers far beyond the limited purpose entities in *Ball* and *Salyer*. *See generally* Haw. Rev. Stat. §§ 10-3 through 10-6. The broad scope of its asserted authority is revealed by Hawaii Revised Statute § 10-3, which provides in pertinent part that the purposes of OHA include:

> (1) The betterment of conditions of native Hawaiians;
>
> (2) The betterment of conditions of Hawaiians;
>
> (3) Serving as the principal public agency in this State responsible for the performance, development, and coordination of programs and activities relating to native Hawaiians and Hawaiians . . . ;
>
> (4) Assessing the policies and practices of other agencies impacting on native Hawaiians and Hawaiians, and conducting advocacy efforts for native Hawaiians and Hawaiians;
>
> (5) Applying for, receiving, and disbursing, grants and donations from all sources for native Hawaiian and Hawaiian programs and services; and
>
> (6) Serving as a receptacle for reparations.

Haw. Rev. Stat. § 10-3. The only sense in which the purpose of OHA is "limited" is that all its activities are directed at a single race. Again, however, neither *Salyer* nor *Ball* give any authority for the proposition that race is an acceptable criterion which would permit limitation of the franchise in a state election despite the express wording of the Fifteenth Amendment.

II

THE OHA FRANCHISE ALSO VIOLATES THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

A. Absent a Compelling State Interest, Any Attempt to Discriminate on the Basis of Race in Voting Also Violates the Fourteenth Amendment

The limitation of the OHA franchise to Hawaiians and native Hawaiians also violates the Fourteenth Amendment, which provides that "[n]o State shall make or enforce any law which shall . . . deny to any person within its jurisdiction the equal protection of the laws." *Shaw v. Reno*, *supra*, held that statutes which have the effect of discriminating on the basis of race with respect to the right to vote presumptively violate the Fourteenth Amendment as well as the Fifteenth Amendment. This is especially so where, like the OHA franchise, the racial restriction is apparent on the face of the statute:

> No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute. See *Personnel Administrator of Massachusetts v. Feeney*, 442 U.S. 256, 272 (1979). Accord, *Washington v. Seattle School District No. 1*, 458 U.S. 457, 485 (1982). Express racial classifications are immediately suspect because, "[a]bsent searching judicial inquiry . . . there is simply no way of determining what classifications are 'benign' or 'remedial' and what classifications are in fact motivated by illegitimate notions of racial inferiority or simple racial politics." *Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989).

Shaw v. Reno, 509 U.S. at 642-43.

The definitions restricting the OHA franchise are clearly racial. The definition of "native Hawaiian" in Hawaii Revised Statute § 10-2 expressly uses the term "race," and "native

Hawaiians" are defined as those descending from the "races" inhabiting the Hawaiian Islands previous to 1778. Although the definition of "Hawaiian" uses the term "descendant of the aboriginal peoples" which inhabited the Hawaiian Islands and exercised sovereignty and subsisted in 1778, the legislative history of the statute reveals that this term was also intended to be racially based. As the Hawaii Legislature stated with regard to the use of the word "peoples":

> The definitions of "native Hawaiian" and "Hawaiian" are changed to substitute "peoples" for "races." Your Committee wishes to stress that this change is non-substantive, and that "peoples" does mean "races."

Conference Committee Report No. 77, 1979 Haw. Sen. J. at 998.

In *Adarand Constructors v. Pena*, 505 U.S. 200 (1995), this Court reaffirmed that "[d]istinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Id.* at 214 (quoting *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial treatment under the strictest judicial scrutiny." 505 U.S. at 224. Without a showing that the racial classification is "narrowly tailored" to further a compelling governmental interest, the racial restriction is invalid:

> [A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by a reviewing court under strict scrutiny. In other words, such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests.

Id. at 227.

The State of Hawaii made no such showing below, instead relying solely on its argument that Hawaiians and native Hawaiians are the constitutional equivalent of an "Indian Tribe," and that its discrimination in favor of Hawaiians and native Hawaiians in the OHA franchise was a "political," rather than racial classification. Such an attempt, as demonstrated below, is a transparent attempt to get around the strict requirements of equal treatment demanded by the Fourteenth Amendment.

B. Hawaiians and Native Hawaiians Are Not an Indian Tribe

The Ninth Circuit concluded that the OHA voter qualification was "clearly racial on its face." *Rice v. Cayetano*, 146 F.3d at 1081. Notwithstanding this, Respondent argued and the court agreed that the racial restriction was exempted from strict scrutiny review because the actions of the State of Hawaii in establishing OHA are "similar to the special treatment of Indians that the Supreme Court approved in *Morton v. Mancari*." *Id.*

In so doing, the Ninth Circuit took *Mancari* and stood it on its head. Amicus submits that *Mancari* provides a narrow exception to the general rule of strict scrutiny, one applicable only to federally recognized Indian Tribes.

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs (BIA) challenged a BIA regulation prescribing employment preference for Indians, on the grounds that it violated the equal protection component of the Due Process Clause of the Fifth Amendment. In upholding the preference, the Court emphasized the "plenary power of Congress . . . to legislate on behalf of federally recognized Indian tribes." *Mancari*, 417 U.S. at 551. As stated by the Court, this plenary power derives from the Indian Commerce and Indian Treaty Clauses of the United States Constitution:

> The plenary power of Congress to deal with the special problems of Indians is drawn both explicitly and implicitly from the Constitution itself. Article I, § 8, cl. 3, provides Congress with the power to "regulate Commerce . . . with the Indian Tribes," and thus, to this extent, singles Indians out as a proper subject for separate legislation. Article II, § 2, cl. 2, gives the President the power, by and with the advice and consent of the Senate, to make treaties.

Id. at 551-52.

Of fundamental importance to the present case, the Court concluded that the hiring preference was not "racial," but "political," because it did not apply to all Indians but only to those who were members of federally recognized Indian Tribes:

> The preference is not directed towards a "racial" group consisting of "Indians"; instead, it applies only to members of "federally recognized" tribes. This operates to exclude many individuals who are racially to be classified as "Indians." In this sense, the preference is political rather than racial in nature.

Id. at 553 n.24. The Court emphasized that it was membership in a federally recognized tribal group that was the critical distinction:

> The preference . . . is granted to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entitles whose lives and activities are governed by the BIA in a unique fashion . . . . In the sense that there is no other group of people favored in this manner, the legal status of the BIA is truly *suigeneris*.

Id. at 554. Because of this distinction, the hiring preference for tribal members was not suspect, and instead was subject to review under a rational basis analysis. *Id.* at 555.

The Court's subsequent decisions have continued to emphasize that legislation singling out either Tribes, or Indians

as enrolled tribal members, does not offend equal protection because it is rationally related to Congress' plenary relationship with the "Indian Tribes." Thus, in *Duro v. Reina*, 495 U.S. 676 (1990), the Court made reference to "the Federal Government's broad authority to legislate with respect to enrolled Indians as a class, whether to impose burdens or benefits." *Id.* at 692. In *United States v. Antelope*, 430 U.S. 641 (1977), the Court stated that "federal legislation with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *Id.* at 645. *Also see, e.g., Fisher v. District Court*, 424 U.S. 382, 390-91 (1976); *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976); *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979).

It is undisputed that there is no Hawaiian or native Hawaiian "tribe."[3] Respondent can point to no treaty between a Hawaiian or native Hawaiian entity and the United States recognizing Hawaiians or native Hawaiians as a tribe.

Nor do Hawaiians and native Hawaiians meet the statutory or regulatory definition of those groups which would qualify to be recognized as a tribe. The federal statutes governing the formal organization and incorporation of an Indian Tribe, *see* 25 U.S.C. §§ 476-77, exclude groups in "any of the Territories, colonies, or insular possessions of the United States [except for] the Territory of Alaska." 25 U.S.C. § 473. Since Hawaii was a territory at the time of enactment of the statute in 1934, as stated by the Ninth Circuit in an opinion considering whether a native Hawaiian group could constitute a tribe, "Congress did

[3] The term "tribe" has been defined by the Court as "a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular although sometimes ill-defined territory." *United States v. Montoya*, 180 U.S. 261, 266 (1901), *also see United States v. Candelaria*, 271 U.S. 432, 442 (1926) (utilizing *Montoya* definition), and *United States v. Chavez*, 290 U.S. 357, 364 (1933) (same).

not originally intend the statutes governing the organization of new Indian tribes to apply to aboriginal groups in Hawaii." *Price v. State of Hawaii*, 764 F.2d 623, 626 (9th Cir. 1985). Hawaiians and native Hawaiians also do not meet the requirements for recognition as a tribe under the regulations by which the BIA acknowledges tribal existence. *See* 25 C.F.R. Part 83 (1984). These regulations establish tribal existence as

> a prerequisite to the protection, services, and benefits of the Federal Government available to Indian tribes by virtue of their status as tribes. Such acknowledgment shall also mean that the tribe is entitled to the immunities and privileges available to other federally acknowledged Indian tribes . . . ."

25 C.F.R. § 83.2. The regulations, however, are explicitly limited to "only those American Indian groups indigenous to the continental United States." 25 C.F.R. § 83.3(a).

That in itself should end the inquiry. Nevertheless, Respondent has taken the position below that Hawaiians and native Hawaiians are entitled to an equivalent treatment because of a "special trust relationship" among the United States, the State of Hawaii, and native Hawaiians, evidenced by Section 5(f) of the Hawaii Admission Act., Pub. L. No. 86-3, 73 Stat. 4, and the Hawaiian Homes Commission Act, Pub. L. No. 67-34, 42 Stat. 108.[4] Neither statute, however, provides any support for the assertion that the federal government considers Hawaiians and native Hawaiians to be a tribe within the meaning of *Morton v. Mancari*.

First, the HHCA only established a housing program for native Hawaiians on a certain portion of the ceded lands. It

[4] Respondent below also pointed to a number of federal statutes which include Hawaiians or native Hawaiians as racial groups entitled to special benefits or treatment by the federal government. Neither these statutes, nor the HHCA or the Hawaii Admission Act, have been tested judicially in light of *Adarand*.

granted no self-governing, independent, or "quasi-sovereign" status to the Department of Hawaiian Home Lands. Similarly, Section 5(f) of the Hawaii Admission Act simply provides that a permissible use for the ceded lands conveyed to the State of Hawaii was "for the betterment of conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended."[5] However, other than the lands devoted to the Hawaiian home lands program under Section 4 of the Hawaii Admission Act, the State of Hawaii was not required to devote any of its ceded lands for native Hawaiians:

> Such [ceded] lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide . . . .

Indeed, until the creation of OHA, the State of Hawaii devoted most of the ceded land income and proceeds to funding the programs of the Hawaii State Department of Education. *See* 80-8 Haw. Att'y Gen. Op., 1980 WL 26216.

Thus, the creation of OHA cannot be viewed as required by any provision of federal law, and certainly is not the result of the State of Hawaii carrying out a mandated federal "trust" relationship. Instead, it is an attempt by the State of Hawaii to create its own version of a "tribe." This Court has made clear, however, that states have no power to create "tribes." That authority rests solely with the federal government. *See Washington v. Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. at 501.

That OHA is a pure state creation is confirmed by the legislative history of Hawaii Revised Statute Chapter 10. Directly relevant is the following statement by the 1979 Hawaii Senate Standing Committee:

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[5] The lands governed by the HHCA are a portion of the ceded lands. *See* Hawaii Admission Act, 73 Stat. 4, § 5(b).

> *The State's Plenary Power Over the Office of Hawaiian Affairs.* To give specific definition to the language "provided by law" as found in Article XII, section 6 [of the Hawaii Constitution], we turn to the case of *Santa Clara Pueblo v. Martinez*, 98 Sup. Ct. 1670 (1978), cited in Committee of the Whole Report No. 13, where on Page 1676 of the decision it is noted that despite the recognition given Indian tribes as distinct and independent communities, Congress retains "plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *This is not to intimate that the Office of Hawaiian Affairs is equated with Indian tribes. Rather, it is merely to state that even if that was the case, the State would maintain plenary powers over it.*

Senate Standing Report No. 773, 1979 Haw. Sen. J. at 1352 (emphasis added).

The illegitimacy of OHA is further confirmed by the fact that its beneficiaries (as well as the limited electorate which may vote for its trustees) are not restricted to native Hawaiians, but also includes "Hawaiians" with less than a 50% blood quantum. As noted by the Ninth Circuit, the State of Hawaii justifies its creation of OHA on the ground that

> the genesis of the whole structure was Congress's requirement that the new state of Hawaii accept the definition of native Hawaiian in the HHCA and accede to the purposes of the 5(f) trust which include, in part, the betterment of the conditions of native Hawaiians . . . [and that therefore] under *Morton v. Mancari* . . . the federal government and the state of Hawaii have the same special relationship with and owe the same

unique obligation to native Hawaiians as the federal government does to Indian tribes.

Rice v. Cayetano, 146 F.3d at 1078-79.

As demonstrated above, neither the HHCA nor the Admission Act created any special relationship. But even if it were conceded for the sake of argument that they did create some sort of "trust" relationship equivalent to a "tribe," that relationship would exist only with native Hawaiians with at least 50% Hawaiian blood, not the much broader racial class of those with any Hawaiian blood whatsoever, no matter how minuscule that quantum may be. Amicus contends that inclusion of those persons demonstrate that the OHA scheme does not meet even the rational basis test of *Mancari*.

In summary, the State's creation of OHA cannot be viewed as anything other than the creation of a racial class structure under which Hawaiians and native Hawaiians, and Hawaiians and native Hawaiians alone, receive benefits not available to other citizens of the State of Hawaii. While Petitioner did not directly contest the underlying constitutionality of OHA, such a state-created, race-based organization cannot be advanced by Petitioner as a legitimate basis for limiting the franchise on the basis of race.[6]

Once Respondent had asserted a race-based legislative scheme as the justification for the State's discriminatory voting practices, the court below was obligated to subject it to strict scrutiny: "[A]ll racial classifications, imposed by whatever federal, state, or local government actor, must be analyzed by the reviewing court under strict scrutiny." *Adarand*, 515 U.S. at 227. Not only did Respondent not put forward any evidence

[6] For an extensive analysis whether Hawaiians and native Hawaiians can claim a legal status similar to members of Indian Tribes, see Stuart Minor Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L. J. 537 (1996).

which would justify the State's actions under *Adarand*, it is clear that the OHA scheme does not meet strict scrutiny review.

Respondent can put forth no competent evidence that OHA is necessary to remedy any past or present discriminatory government treatment of Hawaiians or native Hawaiians. *Wygant v. Jackson Board of Education*, 476 U.S. 267, 274 (1986). Indeed, what evidence exists shows that Hawaiians and native Hawaiians held a preferential position in society during most of the period of the Territory, and received benefits not available to other racial groups, the HHCA being the most obvious example. Hawaiians constituted an absolute majority of the registered voters in Hawaii for the first quarter of the twentieth century and the largest single voting group until 1940. Lawrence H. Fuchs, Hawaii Pono, at 80 (1961). During that period, Hawaiians comprised more than half the candidates for elected office. *Id.* at 161.

This was reflected in Hawaiians' heavy dominance of government. For example, in 1927 Hawaiians held 46% of the appointive executive positions, 55% of the clerical and other government jobs in the Territory, and more than half of the judgeships and elective offices. *Id.* at 162. A study conducted in 1935 showed that Hawaiians, although less than 15% of the total population, held almost a third of the public service jobs in the Islands. *Id.*

Those facing discrimination were in fact primarily immigrant plantation workers, especially the Japanese. *Id.*, at 82-83. This was reflected in plantation wage scales, where occupational status was based on ethnic identity. For example, on the plantations in the early 1900s the daily wage for Hawaiians was $2.94, but the wage for Japanese was only $1.50. *Id.* at 55.

Since a history of discrimination cannot be demonstrated, the OHA scheme cannot be described as a "narrowly tailored" means of correcting such discrimination, let alone being a

program that "will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 237. Further, even if discrimination were simply presumed (which it cannot be), there is nothing in the record that shows any consideration of the use of race-neutral alternatives. *Id.*

III

ACCEPTANCE OF THE NINTH CIRCUIT'S REASONING LEGITIMIZING RACIAL RESTRICTIONS IN VOTING WOULD NOT ONLY EVISCERATE THE FIFTEENTH AMENDMENT BUT WOULD OVERTURN THIS COURT'S EQUAL PROTECTION JURISPRUDENCE

As demonstrated above, there is no reason justifying the racially limited franchise for OHA elections. The Fifteenth Amendment is absolute and means what it says: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color or previous condition of servitude."

Nor can respondent point to any provision of federal law which would justify such treatment on the basis that Hawaiians and native Hawaiians are a "tribe" entitled to special treatment under *Morton v. Mancari*. Lacking a federal basis, the only "trust" provisions are those which the State of Hawaii itself created to benefit a specific race.

Notwithstanding this, the Ninth Circuit chose to blithely ignore this Court's long-held jurisprudence that government classifications which discriminate on the basis of race are inherently suspect and subject to the most searching examination, and are presumptively invalid absent a showing both of a compelling interest for the classification and that the classification is narrowly tailored. *Adarand*, 515 U.S. at 235. Instead, the Court simply "accept[ed] the trusts and their administrative structure as we find them, and assume[d] that both are lawful." *Rice v. Cayetano*, 146 F.3d at 1079. Even

more breathtaking, the court indicated that the State of Hawaii's actions not only had a rational basis but would pass strict scrutiny review as well:

> [E]ven if the voting restriction must be subject to strict judicial scrutiny because the classification is based explicitly on race, it survives because the restriction is rooted in the special trust relationship between Hawaii and descendants of aboriginal peoples who subsisted in the Islands in 1778 and still live there . . . thus, the scheme for electing trustees ultimately responds to the state's compelling responsibility to honor the trust, and the restriction on voter eligibility is precisely tailored to the perceived value that a board "chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles." 1 Proceedings of the Constitutional Convention of Hawaii of 1978, Standing Committee Rep. No. 59 at 644.

Id. at 1082.

Summarizing, the court's decision counsels that by the device of characterizing a scheme which creates a racially defined system of benefits and privileges as a "trust" between the State and the benefited class, not only can a State escape judicial review of such acts, but it may also, through racial restriction of the franchise, lawfully prohibit the rest of its citizenry from having any say in the matter. The conclusion that certain matters are of concern only to specific races comes dangerously close to resurrecting the "separate but equal" system of racial segregation once validated by *Plessy v. Ferguson*, 163 U.S. 537 (1896), and ignores the numerous decisions of this Court that a racial classification is presumptively invalid regardless of purported motivation. *See, e.g., Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (all classifications, including those asserted to be "benign," subject to searching judicial scrutiny).

If such can be done for Hawaiians and native Hawaiians, the potential exists for creation of similar vehicles for other racial groups as well. Although *Adarand* clearly indicates that race-based preferences are constitutional in certain circumstances, no case law indicates that decisions about how the preference should be administered will thereafter be made only by the benefited class to the exclusion of the rest of the society.

Limiting decision making to specific groups based "on the color of their skin . . . bears an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. at 647. The danger of apportioning assets, and the exclusive right to make determinations about those assets, to specific races as was done by the State of Hawaii in this case, is that it eventually will lead to a system of racial balkanization destructive of the democratic ideal embodied in our Constitution. As eloquently put by Justice Douglas:

> When racial or religious lines are drawn by the State, the multiracial, multireligious communities that our Constitution seeks to weld together as one become separatist; antagonisms that relate to race or to religion rather than to political issues are generated; communities seek not the best representative but the best racial or religious partisan. Since that system is at war with the democratic ideal, it should find no footing here.

Wright v. Rockefeller, 376 U.S. 52, 66-67 (1964) (dissenting opinion).

Further, the lower court's unwarranted reading of *Mancari* as validating racial classifications of persons so long as they possess any percentage of aboriginal blood is repugnant to the Court's entire equal protection jurisprudence.

As the Court has noted, the "rights created by the first section of the Fourteenth Amendment are, by its terms, guaranteed to the *individual*. The rights established are *personal rights*." *Shelley v. Kraemer*, 334 U.S. 1, 22 (1948) (emphasis added). The broad reading of *Mancari* advocated by Respondent instead makes the extent of the right to equal treatment solely dependent upon one's membership in a group qualified by race. In other words, under the OHA scheme upheld by the court below, whether or not a person is entitled to certain treatment is determined by whether she is a member of the racial group which possesses Hawaiian blood, or of the racial group which does not possess Hawaiian blood.

The Court in *Mancari* was careful, however, to indicate that it was not upholding a preference based on "group" rights, but rather was acknowledging the "unique legal status of Indian Tribes" constitutionally mandated by the Indian Treaty and Commerce Clauses. *Mancari*, 417 U.S. at 551-52. Thus, the Court emphasized that the hiring preference upheld by the Court was "not directed towards a 'racial' group consisting of 'Indians,' [but] "instead . . . only applies to members of 'federally recognized' tribes." *Id.* at 553 n.24.

The bottom line is first, if Hawaiians were an Indian tribe, they would be subject to the plenary authority of Congress to the exclusion of Hawaii law and OHA would be invalid as an intrusion into a field fully occupied by the federal government. Second, while the Constitution grants Congress special powers as to Indian tribes which may override the Fourteenth and Fifteenth Amendments, those powers are exclusive to Congress. The Constitution nowhere grants statues any powers that override the Fourteenth and Fifteenth Amendments.

This distinction was ignored by the court below. As a result, the decision below throws open the door to creation of a society where equal treatment before the law is no longer the right of the individual, but rather is only derivative of group rights.

CONCLUSION

"The right to vote . . . is of the essence of democratic society." *Reynolds v. Sims*, 377 U.S. at 555. The Fifteenth Amendment prohibits all efforts to "segregat[e] . . . voters" on the basis of race. *Gomillion v. Lightfoot*, 364 U.S. at 341. The OHA franchise, limited by race, has the clear effect of permanently segregating the citizens of the State of Hawaii into two separate racial groups.

The decision of the court below also embraces a philosophy of group rights which is fundamentally at odds with the democratic ideals of the Constitution as well as the precept that it is individuals, not groups, who have rights to equal protection under the law.

The Court must take a firm stance and declare that any express racial limitation on the right to vote such as that contained in the OHA scheme offends the Fourteenth and Fifteenth Amendments and is invalid.

DATED: May, 1999.

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No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO,
GOVERNOR OF THE STATE OF HAWAII,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

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BRIEF OF AMICI CURIAE CAMPAIGN FOR A COLOR-BLIND AMERICA, AMERICANS AGAINST DISCRIMINATION AND PREFERENCES, AND THE UNITED STATES JUSTICE FOUNDATION IN SUPPORT OF PETITIONER

INTEREST OF THE AMICI

The Campaign for a Color-Blind America ("CCBA") is a nationwide legal and educational organization, headquartered in Houston, Texas and dedicated to the cause of educating the public about the injustice of racial preferences in public policy.[1] Since its inception in 1993,

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* state that no counsel for any party to this dispute authored this brief in

CCBA has actively facilitated and participated in legal challenges to race-conscious public policies, including challenges to race-based admissions policies of educational institutions, racial set-asides in public contracting, and race-conscious voting schemes. CCBA assists potential plaintiffs in these cases by, among other things, finding legal representation and locating expert witnesses. When an important issue affecting its charter comes before this Court, CCBA also appears as *amicus curiae* to assist the Court in deciding the case before it. *See Piscataway Township Board of Educ. v. Taxman,* No. 96-670, Brief *Amici Curiae* of the Institute for Justice and Campaign for a Color-Blind America (filed Oct. 8, 1997), *writ dismissed,* 118 S. Ct. 595 (1997).

Amici Americans Against Discrimination and Preferences ("AADAP") and the United States Justice Foundation ("USJF") are both California-based non-profit organizations dedicated to the preservation and promotion of equal protection of the laws. AADAP is a non-profit public benefit corporation dedicated to disseminating to the public information regarding civil rights guaranteed by the United States Constitution and otherwise to educate the public about the effects of discrimination and preferential treatment on American society. Similarly, USJF is a non-profit foundation dedicated to the promotion and preservation of constitutional rights. Since its inception in 1979, USJF has regularly assisted individuals and classes, not only to redress individual acts of injustice, but also to analyze important public policy matters affecting constitutional rights. Further, USJF routinely

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whole or in part and no person or entity, other than *amici curiae* and their members, made a monetary contribution to the preparation or submission of this brief. All parties have consented to *amici*'s filing in letters of consent on file with the Office of the Clerk of this Court.

files, or joins, friend of the court briefs to promote and protect the civil rights of all U.S. citizens.

Amici respectfully submit this brief to share with the Court their views on the proper application of the Fifteenth Amendment to the challenged Hawaiian voting scheme and to demonstrate the potential dangers of affirming the Ninth Circuit's decision in this case. Despite respondent State of Hawaii's ("Hawaii") characterization of this dispute as "unique to Hawaii," Respondent's Brief in Opposition at 12 ("Resp. Opp."), *amici* and their members believe that this Court's adoption of the Ninth Circuit's rationale would have potentially widespread ramifications beyond the Hawaiian Islands and could, in fact, be used by other States to deprive the elective franchise to large segments of society and otherwise to justify the very invidious racially-discriminatory state action that the Civil War Amendments were adopted to eliminate. *See, e.g., McLaughlin v. Florida,* 379 U.S. 184, 191-92 (1964) ("central purpose" of Civil War Amendments "was to eliminate racial discrimination emanating from official sources in the States").

SUMMARY OF ARGUMENT

" 'The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . .' " *Shaw v. Reno,* 509 U.S. 533, 555 (1964) (citation omitted). In order to guarantee that right to all races, the States ratified in 1870 the Fifteenth Amendment to the Constitution, which provides that no State may "den[y] or abridge[]" the right of citizens of the United States to vote "on account of race, color, or previous condition of servitude." U.S. Const. amend. XV, § 1. That Amendment, "by its limitation on the power of the States in the exercise of their right to prescribe the qualifications of voters in their own elections . . . , clearly shows that the

right of suffrage was considered to be of supreme importance to the national government, and was not intended to be left within the exclusive control of the States." *Ex Parte Yarborough*, 110 U.S. 651, 664 (1884). As a result, this Court has interpreted the Fifteenth Amendment as a *per se* rule against racial discrimination in voting.

The Hawaiian voting scheme challenged in this case is facially inconsistent with the clear prohibition contained in the Fifteenth Amendment. The Hawaiian statute that defines eligible voters for the Office of Hawaiian Affairs ("OHA") contains on its face a racial restriction, limiting qualified electors to "Hawaiians," as defined by race. "[A] more direct and obvious" violation of the plain language of the Fifteenth Amendment can hardly be imagined. *Cf. Nixon v. Herndon*, 273 U.S. 536, 540-41 (1927) (invalidating under Fourteenth Amendment race-based voting restriction contained in state statute). Moreover, none of the State's justifications for the racial classification contained in the statute overcome the Fifteenth Amendment's prohibition against race-based voting systems—a prohibition that is both absolute and self-executing. *See, e.g., Neal v. Delaware*, 103 U.S. (13 Otto.) 370, 389 (1880) (invalidating race-based voting restriction contained in state constitution).

The Ninth Circuit's recognition of Hawaii's race-based justification for the discriminatory voting scheme turns the Fifteenth Amendment on its head and would permit broad-based racial discrimination by any number of other States. Simply by declaring an "historical trust relationship" with a native population, as defined by race, States could justify the very invidious voting schemes that the Fifteenth Amendment was designed to condemn. If the Ninth Circuit's rationale is affirmed by this Court, States such as Texas, California and Louisiana—States that could equally

demonstrate an historical trust relationship with a native racial group—could deprive the franchise to the vast majority of their citizens, all in the name of promoting that unique relationship. The Fifteenth Amendment does not permit the exclusive grant of the franchise to a favored race. Consequently, under this Court's jurisprudence, the racial limitation on eligible voters for the OHA is invalid.

ARGUMENT

I. THE CHALLENGED HAWAIIAN VOTING SCHEME VIOLATES THE FIFTEENTH AMENDMENT

A. The OHA Election Scheme Is *Per Se* Invalid Under the Fifteenth Amendment.

The Fifteenth Amendment's proscription against racial discrimination in state voting laws is as clear as it is absolute: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." U.S. Const. amend XV, § 1. "[T]he command of the Amendment [is] self-executing and reache[s] without legislative action the conditions of discrimination against which it was aimed. . . ." *Guinn v. United States*, 238 U.S. 347, 363 (1915); *see also South Carolina v. Katzenbach*, 383 U.S. 301, 325 (1966). Consequently, any state statutory or constitutional provision that denies to any citizen of the United States the right to vote on account of race or color is "destroyed by the self-operative force of the Amendment." *Guinn*, 238 U.S. at 364. Under this Amendment, the challenged Hawaiian voting scheme, which on its face denies the elective franchise in elections for board members of the OHA to *all* but a narrow, racially defined class of "Hawaiians," *see* Haw. Const. Art. XII, § 5; Haw. Rev. Stat. §§ 10-2, 13D-3, is *per se* invalid.

Although the Fourteenth and Fifteenth Amendments are often treated by litigants as co-extensive when applied to racially discriminatory voting schemes, a close examination of this Court's jurisprudence demonstrates that the Fifteenth Amendment even more stringently protects the franchise from race-based classifications. The Equal Protection Clause of the Fourteenth Amendment demands strict scrutiny of a facially racial statutory classification. *See, e.g., Shaw v. Reno*, 509 U.S. at 642 ("Express racial classifications are immediately suspect. . . ."); *Hunt v. Cromartie*, No. 98-85, slip op. at 4 (U.S. May 17, 1999) ("[A]ll laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized."). "[A]ny person, of whatever race, has the right to demand that any governmental actor subject to the Constitution justify any racial classification subjecting that person to unequal treatment under the strictest judicial scrutiny." *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 224 (1995); *see also City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-94 (1989) (opinion of O'Connor, J.). Under that rigid equal protection standard, a racial classification "must serve a *compelling* governmental interest, and must be *narrowly tailored* to further that interest." *Adarand Constructors*, 515 U.S. at 235 (emphasis added).

While this standard admittedly presents a significant hurdle to upholding a facially racial statutory classification,[2] the Fifteenth Amendment is even more demanding.

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[2] This Court has only identified one "compelling governmental interest" that satisfies the strict scrutiny standard: the remedying of " 'pervasive, systematic, and obstinate discriminatory conduct.' " *Adarand*, 515 U.S. at 237 (citation omitted). Even there, the Court has demanded that a State do more than rely on "an amorphous claim that there has been past discrimination in a particular" field of conduct. *J.A. Croson Co.*, 488 U.S. at 469.

Where state voting legislation runs afoul of the plain terms of the Fifteenth Amendment, it is *per se* invalid, *regardless of the interest served by the racial classification or the scope of application of the classification*: "When a legislature thus singles out a readily isolated segment of a racial minority for special discriminatory treatment, it violates the Fifteenth Amendment." *Gomillion v. Lightfoot*, 364 U.S. 339, 346 (1960); *see also Katzenbach*, 383 U.S. at 325 (Fifteenth Amendment "has repeatedly been construed, without further legislative speculation, to invalidate state voting qualifications or procedures which are discriminatory on their face or in practice."). The difference in scrutiny lies in the fundamental nature of the right protected by the Fifteenth Amendment, a right that this Court has described as the very "essence of a democratic society." *Shaw v. Reno*, 509 U.S. at 639 (internal quotations omitted; citation omitted).

Thus, the analysis under the Fifteenth Amendment is simple. The Court asks a single question: "Does the challenged statute, on its face or in its effect, deny any U.S. citizen the right to vote 'on account of race, color, or previous condition of servitude'?" If the answer is "yes," the inquiry is complete, and the discriminatory terms of the statute are struck as invalid. *See Ex parte Yarborough*, 110 U.S. at 665.

Applying this simple but stringent standard here, the challenged Hawaiian voting scheme cannot withstand constitutional scrutiny. The Hawaii statute that sets the qualifications for voting for the OHA trustees contains on its face a racial limitation on electors: "No person shall be eligible to register as a voter for the election of board members unless the voter meets the following qualifications: (1) The person is Hawaiian." Haw. Rev. Stat. § 13D-3(b). That is, in order to qualify as a voter for

the OHA elections, a person must be a "descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples hereafter have continued to reside in Hawaii." *Id.* § 10-2. In effect, the statute limits the right to vote to all but a limited class of native Hawaiians of Polynesian origin, who can trace their bloodline to the race of people that inhabited the island before Captain James Cook's "discovery" of the islands in 1778. *See* Ralph S. Kuykendall, *A History of Hawaii* 54 (1927). The statute's definition thus forbids *all other races*—black, white, Hispanic, or any other race that did not inhabit the Hawaiian Islands prior to 1778—from voting for OHA board members.[3] Because the statute differentiates among qualified and non-qualified voters "on account of race," U.S. Const. amend XV, § 1, it is invalid.

This *per se* rule of invalidity is demonstrated by a long line of cases beginning with *United States v. Reese*, 92

[3] The fact that non-Hawaiian Polynesians are excluded from the statute's preferred classification—and thus that all Polynesians are not benefited by the statute—does nothing to detract from the conclusion that the statute's scope is defined principally by race. While "Polynesians" may be regarded as a racial classification for purposes of the Fifteenth Amendment, the same is equally true of the narrower class of Polynesian Hawaiians that inhabitated the islands prior to arrival of "outsiders" from Europe, Asia and America beginning in 1778: "The Hawaiians as found by Captain Cook (1778) were already a people of mixed racial origin but they had been isolated for so long a time that they may be regarded as a people or stabilized race mixture and they had a stable social organization." Romanzo Adams, *Interracial Marriage in Hawaii* 69 (1937). "What we sometimes refer to as historic races, that is to say, races that have actually existed and had a history, are merely peoples who have acquired distinctive and distinguishing racial traits through long periods of isolation and continued in-breeding." *Id.* at vii. Thus, while its ultimate conclusion was erroneous, the Ninth Circuit's characterization of the Hawaiian statute as containing a racial classification on its face was correct.

U.S. 214 (1875). There, the Court explained the Fifteenth Amendment's absolute prohibition against race discrimination in voting, reasoning that the Amendment "prevents the States . . . from giving preference . . . to one citizen of the United States over another on account of race, color, or previous condition of servitude." *Id.* at 217. Prior to adoption of the Amendment, this form of discrimination was permissible under the Constitution: "It was as much within the power of a State to exclude citizens of the United States from voting on account of race, &c., as it was on account of age, property, or education." *Id.* at 217-18. As a result of adoption of the Amendment, however, "[i]f citizens of one race having certain qualifications are permitted by law to vote, those of another having the same qualifications must be." *Id.* at 218. "It follows," reasoned the Court, "that the amendment has invested the citizens of the United States with a new constitutional right which is within the protecting power of Congress. That right is exemption from discrimination . . . on account of race, color, or previous condition of servitude." *Id.; see also United States v. Cruikshank*, 92 U.S. 542, 555 (1875).

Shortly thereafter, the Court held that any racially discriminatory state statute or constitutional provision that pre-dated the adoption of the Fifteenth Amendment was automatically invalidated by the plain language of the Amendment, without regard to the purpose or interests served by the classification. *See Neal v. Delaware*, 103 U.S. (13 Otto.) 370. In *Neal*, the Court held that a provision of the Delaware state constitution that limited eligible state voters to "white males" was rendered invalid by the Fifteenth Amendment to the extent it contained the racial limitation: "Beyond question the adoption of the Fifteenth Amendment had the effect, in law, to remove from the State Constitution or render inoperative, the pro-

vision which restricts the right of suffrage to the white race." *Id.* at 389. The remedial effect of the statute, therefore, was to strike the word "white" from the state constitutional provision, permitting all races to enjoy equally the right to vote in Delaware elections. *Id.; see also Myers v. Anderson*, 238 U.S. 368, 376 (1915). The Court later noted that a facially discriminatory state election provision that post-dated the enactment of the Fifteenth Amendment would be equally invalid. *Ex parte Yarborough*, 110 U.S. at 665.[4]

It is difficult to understand, under these plain rules, how the challenged Hawaiian voting scheme, which contains no less invidious a racial classification than the Delaware constitutional provision struck down in *Neal*, could survive the pellucid prohibition of the Fifteenth Amendment. The Hawaiian law "singles out a readily isolated segment of a racial minority"—Hawaiians—"for special discriminatory treatment," *Gomillion*, 364 U.S. at 346—to the exclusion of all other eligible voters. Under the rule of *Neal* and *Yarborough*, the racial limitation contained in the Hawaiian voting statute must be struck as invalid under the Fifteenth Amendment.

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[4] In *Yarborough*, the Court explained that, while the Fifteenth Amendment's protections were "mainly designed for citizens of African descent," 110 U.S. at 665, the protections of the Amendment extend to all races. "The principle . . . that the protection of the exercise of this right is within the power of Congress, is as necessary to the right of other citizens to vote as to the colored citizen, and to the right to vote in general as to the right to be protected against discrimination." *Id.* Thus, in this case, because the Hawaiian voting scheme benefits one race to the exclusion of all others, the race of the plaintiff challenging the scheme is irrelevant.

B. The Ninth Circuit's Rationale for Upholding the Hawaiian Voting Scheme Is Inconsistent with This Court's Fifteenth Amendment Jurisprudence.

Despite its recognition that both the Hawaii constitutional and statutory provisions challenged here "contain a racial classification on their face," *Rice v. Cayetano*, 146 F.3d 1075, 1079 (9th Cir. 1998)—an admission that effectively dooms the voting scheme at issue in this case—the Ninth Circuit held that the voting classification did not violate the Fifteenth Amendment. Held up to the light of this Court's Fifteenth Amendment jurisprudence, however, the Ninth Circuit's tortured rationale for upholding the voting scheme cannot survive.

1. The Fifteenth Amendment Applies to Elections for the Office of Hawaiian Affairs.

The Ninth Circuit's principal reason for holding that the Fifteenth Amendment was inapplicable in this case is that the OHA elections are not "a general election for government officials performing governmental functions of the sort that has previously triggered Fifteenth Amendment analysis." 146 F.3d at 1081. Because "[t]he special election for trustees is not equivalent to a general election, and the vote is not for officials who will perform general governmental functions in either a representative or executive capacity," *id.*, the court reasoned, the Fifteenth Amendment is not even implicated by the OHA voting scheme. The lower court's circumvention of the Fifteenth Amendment in this manner completely distorts this Court's jurisprudence.

This Court has *never* held that the Fifteenth Amendment applies only to "general" elections for state officials who perform "general governmental functions." "Clearly the Amendment includes *any election in which public issues are decided or public officials selected.*" *Terry v.*

Adams, 345 U.S. 461, 468 (1953) (opinion of Black, J.) (emphasis added) (footnote omitted); *see also Gray v. Sanders*, 372 U.S. 368, 380 (1963) ("The concept of political equality in the voting booth contained in the Fifteenth Amendment extends to *all phases of state elections*. . . .") (emphasis added); *Smith v. Allwright*, 321 U.S. 649, 657 (1944) (Fifteenth Amendment "specifically interdicts *any denial or abridgement* by a State of the right of citizens to vote on account of color") (emphasis added); *United States v. Mississippi*, 380 U.S. 128, 138 (1965) ("The Fifteenth Amendment protects the right to vote regardless of race against *any denial or abridgement* by the United States or by any State.") (emphasis added).

Indeed, a comparison of the plain language of the Fifteenth Amendment to that of Section Two of the Fourteenth Amendment, adopted just two years prior, confirms the expansive scope of the Fifteenth Amendment's prohibition. Section Two of the Fourteenth Amendment was a stopgap measure directed at voting discrimination, designed to penalize discriminating States by requiring the reduction in a State's proportionate congressional representation whenever the State "denie[s] to any of the male inhabitants of such State" the right to vote. U.S. Const. amend. XIV, § 2. However, Section Two specifically defines the scope of elections to which it applies, expressly limiting its application to "any election for the choice of electors for the President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or members of the Legislature thereof." *Id.* In stark contrast, the Fifteenth Amendment does not specifically limit its application to elections for any particular office, instead securing generally "[t]he right of citizens of the United States to vote." U.S. Const. amend. XV, § 1. In light of the Fourteenth Amendment

model, "the failure of the framers of the Fifteenth Amendment to insert any words limiting the number and kind of elections referred to indicated that they intended it to apply to all elections held under the authority of the constitution and laws of the United States or of the States." John M. Mathews, *Legislative and Judicial History of the Fifteenth Amendment* 38 (1909). "It was, in fact, well understood in Congress at the time the Amendment was under consideration that it applied to any election, from that for presidential elector down to the most petty election for a justice of the peace or a fence-viewer." *Id.* at 38 (footnote omitted). As one of the opponents of the Fifteenth Amendment complained during the debates leading up to its adoption:

> This amendment applies to the election of members of the Legislature and judges, comptrollers, justices of the peace, and constables; *it applies to all elections* . . . . If it were designed only to apply this provision to that which relates to the General Government, then it should be restricted and framed to refer only to elections for electors of President and Vice President and Representatives in Congress. It provides that the States shall *in no elections* disqualify any one on the ground of race, color, or former condition.

Cong. Globe, 40th Cong., 3d Sess., at 905 (1869) (remarks of Sen. Vickers) (emphasis added).

Further evidence of the Fifteenth Amendment's universal applicability to all elections is found in this Court's interpretation of the Amendment. In a pair of cases challenging Texas political party primaries in which eligible voters were limited to qualified white citizens, the Court held that a State may not circumvent the proscription of the Fifteenth Amendment by permitting a private

organization to discriminate in its selection of candidates. *Terry*, 345 U.S. at 466 (opinion of Black, J.); *Smith*, 321 U.S. at 664. In striking down the primary voting schemes, the Court did not attempt to confine the reach of the Amendment's prohibition to any particular state office, instead expressing its scope in broad language: "Under our Constitution the great privilege of the ballot may not be denied a man by the State because of his color." *Smith*, 321 U.S. at 662. The State could no more accomplish this result indirectly—by permitting a political party that effectively decided the general election result to engage in discriminatory practices—than it could directly:

> The United States is a constitutional democracy. Its organic law grants to all citizens a right to participate in the choice of elected officials without restriction by any State because of race. This grant to the people of the opportunity for choice is not to be nullified by a State through casting its electoral process in a form which permits a private organization to practice racial discrimination in the election. Constitutional rights would be of little value if they could be thus indirectly denied.

Id. at 664 (citation omitted).

Later, in *Gomillion*, the Court held that the Fifteenth Amendment prevented the State of Alabama from redrawing the boundaries of the City of Tuskegee so as to remove all but "four or five of its 400 Negro voters." 364 U.S. at 341. Thus, the Court applied the Fifteenth Amendment to prohibit racial discrimination by the State in municipal elections. Taken together, *Smith*, *Terry*, and *Gomillion* confirm that the Fifteenth Amendment prohibition against race discrimination in voting applies to *any*

election for public office over which the State exercises control, whether it be a national, state or local office.

The electoral scheme challenged in this case clearly falls within the broad scope of the Fifteenth Amendment. As the Ninth Circuit explained, the OHA "is a state agency," *Rice*, 146 F.3d at 1078, established by the Hawaiian legislature and given broad authority over state funds. By statute, the Hawaiian legislature has delegated to the OHA several traditional governmental functions. *See* Haw. Rev. Stat. §§ 10-5, 10-6. OHA trustees "have [the] power to manage proceeds and income from whatever source for Native Hawaiians and Hawaiians . . . ; to handle money and property on behalf of OHA; to formulate policy relating to the affairs of native Hawaiians and Hawaiians; to provide grants for pilot projects; and to make available technical and financial assistance and advisory services for native Hawaiian and Hawaiian programs." *Rice*, 146 F.3d at 1080 n.14 (citing Haw. Rev. Stat. § 10-5). Similarly, the OHA board itself has several broad agency and intragovernmental functions: (1) "to develop a master plan for native Hawaiians and Hawaiians;" (2) "to assist in development of other agencies' plans for native Hawaiian and Hawaiian programs and services;" (3) "to maintain an inventory of, and act as clearinghouse for, programs for Native Hawaiians and Hawaiians;" (4) to keep other agencies informed about native Hawaiian and Hawaiian programs;" (5) "and to conduct research, develop models for programs, apply for and administer federal funds and promote the establishment of agencies to serve native Hawaiians and Hawaiians." *Id.*

Hawaii cannot overcome the Fifteenth Amendment's prohibition simply by arguing that the broad governmental functions of an elected state agency official are exercised

for the benefit of a small racial class of "Hawaiians and Native Hawaiians." Nevertheless, the Ninth Circuit's rationale suggests that such a violation of the Fourteenth Amendment Equal Protection Clause, in turn, justifies a violation of the Fifteenth Amendment. But the right to be free from racial discrimination in voting secured by the Fifteenth Amendment would be meaningless if it could be vitiated by the simple device of limiting the scope of an elected public official's functions to serving a particular racial group. As the Court noted in *Lane v. Wilson*, the Fifteenth Amendment "nullifies sophisticated as well as simple-minded modes of discrimination." 307 U.S. 268, 275 (1939).

Consequently, the lower court's attempt to liken the OHA elections to "special purpose elections," upheld against Fourteenth Amendment equal protection challenges in *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973), and *Ball v. James*, 451 U.S. 355 (1981), must fail. Neither case can possibly be read for the extraordinary notion that the Fifteenth Amendment excepts from its scope an election targeted solely for the benefit of a particular racial class. Neither case even raised the issue of race discrimination, and thus neither implicated the Fifteenth Amendment. Instead, those cases stand for nothing more than the unexceptional principle that the "one person, one vote" concept embodied in the Fourteenth Amendment is not offended where a state limits eligibility to vote in a special purpose election to those landowners who are disproportionately affected by the election, *irrespective of their race*. *See Salyer*, 410 U.S. at 727. To extend the race-neutral principles of *Salyer* into a broad Fifteenth Amendment exception for "preferred race" elections is to destroy the very right guaranteed by the Amendment.

2. The Fifteenth Amendment Does Not Tolerate "Political" Justifications for Race-Based Voting Discrimination.

The Ninth Circuit also relied heavily on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974), to support its conclusion that the Fifteenth Amendment was inapplicable to the challenged Hawaiian voting scheme. The lower court cited *Mancari* for the proposition that a State may justify a race-based voting preference by a "unique trust relationship" with a racial class. 146 F.3d at 1080-81. In short, the Ninth Circuit reasoned that such a trust relationship transforms a racial preference contained on the face of a voting statute into a permissible "political" classification. *Id.* at 1081. Because the Ninth Circuit's rationale so obviously distorts the holding of *Mancari*, which was grounded in the federal government's unique relationship with Indian tribes *qua quasi-sovereign governmental organizations*,[5] and because petitioner himself has so clearly demonstrated the limitations of the

[5] This Court has frequently recognized the unique *governmental* relationship between the United States and its Indian *tribes*, which are dependent *quasi*-sovereign governments in the federal system. "We have repeatedly recognized the Federal Government's long-standing policy of encouraging tribal self-government." *Iowa Mut. Ins. Co. v. LaPlante*, 480 U.S. 9, 14 (1987); *see Mancari*, 417 U.S. at 552 (relying on Indian Commerce Clause and Treaty Clause of Constitution as "the source of the Government's power to deal with the Indian *tribes*") (emphasis added). "This policy reflects the fact that Indian tribes retain 'attributes of sovereignty over both their members and their territory.'" *Iowa Mut.*, 480 U.S. at 14 (citation omitted). This *quasi*-sovereignty extends to the "right of reservation Indians to make their own laws and be ruled by them." *Id. Mancari* simply recognized this special governmental relationship and the unique *quasi*-sovereignty enjoyed by the tribes *qua tribes* and thus approved federal preferences directed at "members of 'federally recognized' tribes." *Mancari*, 417 U.S. at 553 n.24 ("The preference is not directed toward a 'racial' group consisting of 'Indians' . . . .").

scope of *Mancari*, *see* Pet. at 17-20, *amici* will not belabor its analysis of the lower court's reasoning here. Nevertheless, the Ninth Circuit's reliance on the "political" justification for a racial classification bears special attention here. That "political" rationale is thoroughly inconsistent with this Court's prior holdings, which have refused to examine the justifications for facially discriminatory statutory provisions. *See* Lawrence H. Tribe, *American Constitutional Law* 335 n.2 (2d ed. 1988) ("The Supreme Court has held that the fifteenth amendment prohibits state action which on its face discriminates against black voters.").

"No inquiry into legislative purpose is necessary when the racial classification appears on the face of the statute." *Shaw v. Reno*, 509 U.S. at 642. Once it is established, as in this case, that a voting scheme contains a racial limitation, no further inquiry into the asserted "political" rationale for that limitation is permitted under the Fifteenth Amendment. *Gomillion* demonstrates this principle. There, the Court held that a racial gerrymandering scheme could not be justified by a "political" desire to realign the boundaries of a municipality. In this regard, the State's political power over its subdivisions, "extensive though it is, is met and overcome by the Fifteenth Amendment . . . , which forbids a State from passing any law which deprives a citizen of his vote because of his race." 364 U.S. at 345. Otherwise legitimate political objectives, the Court reasoned, were irrelevant when carried out by race-conscious methods:

> The opposite conclusion . . . would sanction the achievement by a State of any impairment of voting rights whatever so long as it was cloaked in the garb of realignment of political subdivisions. "It is inconceivable that guaranties embedded in the Constitution of the United States may thus be manipulated out of existence."

Id. (citation omitted). Similarly, here, the State of Hawaii's political justification embraced by the Ninth Circuit—furthering a putative "trust relationship" with a native population—cannot justify the exclusion of *every other racial class in the State* from voting in a statewide election.

In sum, the Hawaiian voting scheme challenged in this case cannot withstand the scrutiny demanded by the Fifteenth Amendment. The governing statute contains on its face a *per se* unlawful racial classification. Under this Court's jurisprudence, that race preference alone dooms the voting scheme. None of the justifications relied upon by the Ninth Circuit or advanced by the respondent in this Court [6]—no matter how benignly characterized by the lower court—can save the OHA scheme from *per se* constitutional invalidity.

II. HAWAII'S RACE-CONSCIOUS JUSTIFICATION FOR ITS VOTING SCHEME WOULD PERMIT BOUNDLESS DEPRIVATIONS OF CONSTITUTIONALLY PROTECTED RIGHTS BY NUMEROUS STATES.

Although respondent characterizes this dispute as "unique to Hawaii," Resp. Opp. at 12, the race-conscious "trust relationship" rationale relied upon by the Ninth Cir-

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[6] Respondent asserts in the margin that the Fifteenth Amendment does not apply here because petitioner Rice did not "show the required discriminatory intent." Resp. Opp. at 29 n.12. However, the very authority relied upon by respondent for that proposition, *City of Mobile v. Bolden*, 446 U.S. 55 (1980), rebuts that proposition where, as here, the racial discrimination is evident on the face of the statute. *City of Mobile*'s requirement of discriminatory purpose arises only where "action by a State . . . is racially neutral on its face. . . ." *Id.* at 62 (opinion of Stewart, J.).

cuit to evade the command of the Fifteenth Amendment has potentially broad ramifications in other States. Any number of States could claim an equally "unique" historical relationship of trust with a core, native population and seek to justify race-conscious preferences and voting schemes on the basis of that trust relationship.[7] By divorcing the holding of *Mancari* from the special *governmental* relationship between the United States and Indian tribes and extracting instead a race-conscious principle permitting state-sponsored discrimination on the mere showing of a "unique history" of trust between a State and a particular racial group, the Ninth Circuit's reasoning would permit numerous other States to engage in equally invidious behavior under the guise of an historically rooted obligation. While no other State currently limits its franchise in such a manner, affirmance of the Ninth Circuit's rationale could potentially open a Pandora's box of race-based state voter preferences.

Several States besides Hawaii can boast a "unique" historical relationship with some insular racial group. Three obvious, though not exclusive, parallels arise in Texas, California and Louisiana.

Prior to its admission to the Union, Texas, like Hawaii, enjoyed a history as an independent sovereign. *See generally* T.R. Fehrenbach, *Lone Star: A History of Texas and Texans* (1968). After the Mexican Revolution of 1821, Texas became a province of the New Mexican republic. *Id.* at 154. That marriage proved doomed, and in 1836, Texas declared its independence from Mexico

[7] The Ninth Circuit also relied upon Hawaii's trust relationship with Hawaiians to conclude that the OHA voting scheme would constitute a compelling governmental interest under the Fourteenth Amendment. *See Rice*, 146 F.3d at 1082. Thus, adoption of Hawaii's "trust relationship" argument would have equally broad ramifications in the equal protection context.

and won that independence at the Battle of San Jacinto. *Id.* at 219-46. For a short time ending with its admission to the Union in 1845, the Republic of Texas ruled as a sovereign nation. *Id.* at 247-67.

Although at the time of its admission to the Union, a majority of its citizens were of Anglo-Saxon descent, *id.* at 154-73, early Texas history shows a unique relationship between the governments in Texas and a people known as the "Tejanos." *See* Arnoldo De León, *The Tejano Community, 1836-1900* (1982); Fehrenbach, *supra*, at 56. These people were "the product of generations of *mestizaje*, that is, the interracial mixture of European Spaniards" and both Mexican and Texas Indians. *See* De León, *supra*, at 2. The *Tejanos* were recognized as citizens of both Spanish Texas and Mexico, respectively. *See* Fehrenbach, *supra*, at 53, 65. Indeed, upon Mexican secession from Spain, the very "idea of a Mexican nation was centered in the *mestizo* group." *Id.* at 156. But just as the native Hawaiians were "displace[d]" upon their incorporation into the United States, the Tejano people often "lost their lands through a number of subterfuges" when Texas subsequently declared its independence from Mexican rule. De León, *supra*, at 14, 17.

The relationship between early Texas and this racial and cultural group thus bears many of the earmarks relied upon by Hawaii to justify the discrimination in this case. First, the Tejanos have a "unique history" as a native people who preceded "American" migration into the territory. *See* Resp. Opp. at 16.[8] They were the

[8] The fact that the Tejano people were the result of interracial socialization between the Spanish settlers of the territory and the local Indian population does nothing to distinguish them from Native Hawaiians. *See* Adams, *supra*, at vii ("It is no longer a secret, even to the laymen, that there are not now and probably never have been . . . any pure races."). Although Hawaii deems

"former subjects of an independent sovereign nation"—Mexico—that was devoted to their prosperity. *Compare id. with* Fehrenbach, *supra,* at 156. When Texas declared its independence from Mexico, these native *Tejanos* were "displace[d]" and often "disadvantage[d]" by the citizens of the new republic. *See* Resp. Opp. at 16. Thus, all that is left in order to satisfy respondent's lax standard is the declaration of a "special trust relationship" by the State of Texas with this racial group. The Texas state government would not have to "concoct at will," *id.* at 17, this historical antecedent in order to pass muster under the Ninth Circuit's permissive standard.

The State of California could similarly declare a "trust" relationship to justify race-based state voting measures favoring the native Hispanic population. California, like Texas, was permanently settled as a Spanish mission in the 1760s. *See* Walton Bean & James Rawls, *California, An Interpretive History* 17 (1988); Andrew F. Rolle, *California, A History* 48 (4th ed. 1987). An early pre-American population followed—"descendants of the free settlers from Mexico and the soldiers of the garrisons and Missions," and the local Indian populations. Robert F. Heizer & Alan F. Almquist, *The Other Californians* 139-40 (1971). These native hispanicized Californians have been called by some historians "Californios." *Id.* at 139; *see also* Leonard Pitt, *The Decline of the Californios*

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a special relationship with the Polynesian Hawaiians that inhabited the island prior to Captain Cook's arrival, the "Polynesians are not a pure race—all descended from the same ancestors. Like the English, the French, and the Americans, they are a mixed up race made up of men and women of different races who came from different places at different times." Kuykendall, *supra,* at 31 (1927). *See also* Adams, *supra,* at 69. Like the Polynesian Hawaiians, the Tejanos are an identifiable race derived from different origins. Indeed, their descendants are still found today in various regions of Texas, such as Nacogdoches. Fehrenbach, *supra,* at 69.

(1970). Upon Mexico's declaration of independence from Spain, "the Spanish nationals who remained in California automatically became Mexican citizens." Heizer & Almquist, *supra,* at 138. Thus, as in Texas, the native Californios were citizens of a sovereign nation prior to California's incorporation into the United States. *See* Bean & Rawls, *supra,* at 98, 126. However, following California's admission to the Union in 1850, the claims of American squatters and subsequent legal battles often resulted in the displacement of these native Californio landowners from their land. Rolle, *supra,* at 236-37. Again, under the Ninth Circuit's expansive rationale, this history might be sufficient to justify modern voting schemes that limit the vote to a racially-defined group of hispanic Californians.[9]

Louisiana's "special relationship" with the Acadians, or "Cajuns," who migrated to South Louisiana from Nova Scotia during Spanish rule of the Louisiana territory, similarly bears resemblance to the Hawaii-Hawaiians relationship. *See generally*, James Harvey Domengeaux, *Comment: Native-Born Acadians and the Equality Ideal*, 46 La. L. Rev. 1151 (1986); Carl A. Brasseaux, *Acadian to Cajun* (1992). Indeed, motivated by this special relationship, in 1968, Louisiana established a state agency, the Council for the Development of French in Louisiana, dedicated to the "preservation of the French language and Acadian culture." Domengeaux, *supra,* at 1155; *see* La. Rev. Stat. § 25:651-653. While the members of this

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9 Hawaii's reliance on the vague notion of "displacement and resulting disadvantage" of the native Hawaiian population as a result of their loss of sovereignty, *see* Resp. Opp. at 16, is squarely at odds with this Court's Fourteenth Amendment requirement that " 'specific instances of discrimination' " or "identified discrimination" are necessary ω justify even assertedly "benign" racial classifications. *See J.A. Croson Co.*, 488 U.S. at 495, 497, 505.

organization are appointed by the governor, the Ninth Circuit's rationale could support their race-based election because of the relationship enjoyed between the State of Louisiana and its Cajun citizens.

These examples demonstrate the inherent unreliability of a "special trust relationship" exception to the Fifteenth Amendment's absolute prohibition of racial discrimination in voting. Of course, respondent may argue that dissimilarities in the history or culture of Hawaiians as compared to these other racial groups distinguish the rationale for the OHA voting scheme from these other States. But such an argument misses the point. When the rationale of *Mancari* is divorced from the distinctive governmental status of Indian tribes within our federal system and their equally distinctive relationship with the federal government, and instead used to justify a "special relationship" between a government and a particular race of people, there is, as Justice Powell noted in *Wygant v. Jackson Bd. of Educ.*, "no logical stopping point." 476 U.S. 267, 275-76 (1986). Loosed from the narrowly confined moorings of *Mancari*, the Ninth Circuit's theory, like the race-conscious rationale invalidated in *J.A. Croson Co.*, "could be used to 'justify' race-based decisionmaking essentially limitless in its scope and duration." 488 U.S. at 498 (opinion of O Connor, J.); *see also Wygant*, 476 U.S. at 276 (warning that, under city's theory, "a court could uphold remedies that are ageless in their reach into the past, and timeless in their ability to affect the future").

Once race itself is used as a justification for race-based discrimination in voting, the very protections afforded by the Fifteenth Amendment are rendered meaningless. The result, illustrated by the OHA voting scheme in this case, is the wholesale deprivation by the State of the rights of its citizens to have a voice in conduct of their government. The Fifteenth Amendment, however, was adopted to secure this voice to all races. *See* Mathews, *supra*, at 21-22 (noting "widely held belief" leading to adoption of Fifteenth Amendment "that universal suffrage is the perfect antidote against all the moral and political ills to which society is subject") (footnote omitted). Because it denies the right to participate in the conduct of elected government to all but a small class of individuals, defined by their race, the OHA voting scheme cannot stand.

CONCLUSION

For the reasons stated herein, this Court should reverse the decision of the Ninth Circuit.

Respectfully submitted,

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IN THE

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OCTOBER TERM, 1998

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BRIEF OF *AMICI CURIAE* CENTER FOR EQUAL OPPORTUNITY, NEW YORK CIVIL RIGHTS COALITION, CARL COHEN, AND ABIGAIL THERNSTROM IN SUPPORT OF PETITIONER

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3788

QUESTION PRESENTED

Whether the court of appeals erred in holding that the Fourteenth and Fifteenth Amendments to the United States Constitution permit the adoption of an explicit racial classification that restricts the right to vote in statewide elections for state officials.

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BRIEF OF *AMICI CURIAE* CENTER FOR EQUAL OPPORTUNITY, NEW YORK CIVIL RIGHTS COALITION, CARL COHEN, AND ABIGAIL THERNSTROM IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE[1]

The Center for Equal Opportunity is a non-profit organization dedicated to the idea that America should be one nation and that citizens of all races, colors, and ethnicities

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S. Ct. R. 37.3(a). Counsel for a party did not author this brief in whole or in part. *See* S. Ct. R. 37.6. No person or entity other than the amici curiae and counsel made a monetary contribution to the preparation or submission of this brief. *See id.*

should be treated equally. The New York Civil Rights Coalition is a non-profit organization seeking to achieve a society where the individual enjoys the blessings of liberty free from racial prejudice, stigma, caste, or discrimination. Carl Cohen is a Professor of Philosophy at the University of Michigan, has served for many years in the leadership of the American Civil Liberties Union, and is the author of *Naked Racial Preference* (1995). Abigail Thernstrom is the co-author of *America in Black and White: One Nation, Indivisible* (1997) and the author of *Whose Votes Count? Affirmative Action and Minority Voting Rights* (1987). Amici submit that the Fourteenth and Fifteenth Amendments prohibit Hawaii's racial voting qualification.

SUMMARY OF ARGUMENT

The Fifteenth Amendment to the United States Constitution provides: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment, by its language and history, applies to all state elections.

Notwithstanding the clear language of the Fifteenth Amendment, Hawaii determines a citizen's qualifications to vote in elections for the Office of Hawaiian Affairs *solely on the basis of the citizen's race*. Hawaii's racial voting qualification is a clear violation of the Fifteenth Amendment, and that violation alone requires reversal of the decision of the court of appeals.

The racial voting qualification also violates the Equal Protection Clause of the Fourteenth Amendment. This Court's cases establish that the Equal Protection Clause prohibits racial classifications except when such classifications are necessary and narrowly tailored to serve a compelling government interest.

Outside of an immediate threat to life or limb, as in a prison race riot, a compelling government interest exists only when the government has imposed the racial classification as a remedy for past, identified discrimination in that jurisdiction and field (such as discrimination in the schools in a particular jurisdiction). Hawaii has not shown or attempted to show that its racial voting qualification in elections for the Office of Hawaiian Affairs is designed to remedy past discrimination in voting against "Hawaiians" in Hawaii.

In any event, even assuming such past discrimination, a racial qualification to *vote* has never been held necessary and narrowly tailored to remedy past discrimination. Moreover, this racial voting qualification is not narrowly tailored in scope: It is a strict racial qualification that *categorically* excludes members of certain racial groups (all but "Hawaiians") from the ballot in elections for the Office of Hawaiian Affairs — including members of racial groups historically discriminated against in the United States and in Hawaii. Nor is the racial qualification narrowly tailored in duration: Hawaii established the racial classification in 1978, and it has no termination date.

Hawaii has explained that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But a state has no right to engage in racial classifications on the right to vote in a state election simply to preserve a particular culture. This Court has forbidden analogous "cultural" justifications for racial classifications in cases ranging from *Brown v. Board of Education* to *Loving v. Virginia*.

Finally, Hawaii's attempt to end-run the Equal Protection Clause by analogizing "Hawaiians" to American Indian tribes is entirely unavailing. As this Court repeatedly has held, differential treatment of Indian tribes *as tribes* is justified by the Constitution's specific reference to Indian tribes as separate sovereigns. The Constitution does not contain a Hawaiian

Commerce Clause, and Hawaiians do not and could not qualify as an American Indian tribe.

ARGUMENT

INTRODUCTION

Hawaii determines a citizen's qualifications to vote in state elections for the Office of Hawaiian Affairs *on the basis of the citizen's race*. As is clear from that introductory sentence alone, Hawaii's racial restriction on voting is a patent violation of the United States Constitution. *See City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989); *Loving v. Virginia*, 388 U.S. 1 (1967); *Anderson v. Martin*, 375 U.S. 399 (1964); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960); *Guinn v. United States*, 238 U.S. 347 (1915).[2]

Two provisions of law provide the backdrop for this controversy: the federal Admission Act of 1959 and the Hawaii Constitution, as amended in 1978. The Admission Act, enacted by Congress at the time of Hawaii's admission to the Union, ceded to the State approximately 1,800,000 acres of land that the United States had owned since 1898. The Admission Act restricted the State's use of land to five purposes: (1) support of public schools; (2) betterment of the conditions of native Hawaiians; (3) development of farm and home ownership on as widespread a basis as possible; (4) making of public improvements; and (5) provision of lands for public use. Admission Act of March 18, 1959, 73 Stat. 4, § 5(f).

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[2] We will use the terms "race" and "racial" throughout this brief to encompass the overlapping concepts of race, ethnicity, ancestry, and national origin, as government distinctions based on such characteristics are subject to the same stringent constitutional scrutiny. *See Oyama v. California*, 332 U.S. 633, 646 (1948); *Yick Wo v. Hopkins*, 118 U.S. 356, 374 (1886). We will adopt the convention of state law and use the term "Hawaiian" to refer to those whose ancestors were Hawaiian. For purposes of our brief, there is no need to further distinguish by blood amount between "Hawaiians" and "native Hawaiians," although state law does so.

The Admission Act further provided that "[s]uch lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide." *Id.* The Act thereby permitted the State to use those lands in a race-neutral way and/or for the benefit of *all* citizens of Hawaii. Indeed, that is precisely how the State administered the lands from 1959 to 1978 when the State used money from the lands on a race-neutral basis primarily for state educational purposes. Pet. App. 5a.[3]

In 1978, however, Hawaii dramatically changed course. The State enacted a constitutional amendment, *see* Haw. Const. art. xii, which along with a statute enacted shortly thereafter accomplished three things. *First*, the State required that 20% of the proceeds from the Admission Act lands be used solely to benefit certain native Hawaiians. *Id.*; Haw. Rev. Stat. §§ 10-3(1); 10-13.5. *Second*, the State created the Office of Hawaiian Affairs (OHA) to administer that 20% portion of the proceeds *and* to administer solely for the benefit of Hawaiians other monies received from general state funds. The OHA's officers must be Hawaiians. Haw. Const. art. xii. *Third*, the State imposed still another racial qualification, allowing only Hawaiians to vote in the OHA elections. Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register *as a voter* for the election of board members unless the person meets the following qualifications: (1) The person is Hawaiian . . . .").

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[3] A discrete block of 200,000 acres is administered by the State's Department of Hawaiian Home Lands pursuant to a separate statutory regime. A 1920 federal statute (the Hawaii Homes Commission Act, 42 Stat. 108) dealt with those lands by means of an express racial classification, albeit one that was not applied in the decades that followed. In any event, the HHCA program is not at issue here, although it also has serious constitutional problems to the extent that it relies on racial classifications.

The entire scheme is infused with explicit racial quotas, exclusions, and classifications to a degree this Court has rarely encountered in the last half-century. *See generally Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 730 (1994) (Kennedy, J., concurring in judgment). The scheme benefits one preferred racial class within the State of Hawaii to the exclusion of all others and creates collateral racial classifications that are unnecessary even to serve that (itself unconstitutional) purpose. The scheme is a clearcut and extensive violation of the Constitution: None of its three elements, particularly the voting qualification at issue here, is constitutional.

Under the State's theory, the State of Massachusetts could declare certain state funds in Massachusetts to be distributed for the benefit of Irish-Americans, establish an Office of Irish Affairs composed solely of Irish-Americans to administer the funds, and restrict the vote for that Office to those citizens of Massachusetts with Irish blood. The State of Florida could do the same for Cuban-Americans, the State of Wisconsin for German-Americans, the State of Texas for Mexican-Americans, and so on. As a matter of logic and of constitutional law, affirmance of the court of appeals decision could usher in an extraordinary racial patronage and spoils system.

Hawaii no doubt will label such concerns an exaggeration, suggesting that other states would not adopt such a scheme. But we do not possess so clear a crystal ball as to confidently predict how a state 10 or 25 or 50 years from now might utilize a decision in Hawaii's favor in this case. And ultimately the Court must consider what a ruling in Hawaii's favor would *authorize*. *See Morrison v. Olson*, 487 U.S. 654, 731 (1988) (Scalia, J., dissenting). As Justice Jackson stated, "once a judicial opinion rationalizes such an order to show that it conforms to the Constitution, or rather rationalizes the Constitution to show that it sanctions such an order, the Court

for all time has validated the principle of racial discrimination . . . . The principle then lies about like a loaded weapon ready for the hand of any authority that can bring forward a plausible claim of an urgent need." *Korematsu v. United States* 323 U.S. 214, 246 (1944) (Jackson, J., dissenting).

The aspect of the OHA program specifically at issue here is the racial voting qualification, which violates both the Fifteenth Amendment and the Fourteenth Amendment.

I. THE FIFTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

The Fifteenth Amendment to the Constitution, ratified in the wake of the Civil War on February 3, 1870, speaks clearly and definitively: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." The Amendment repaired the Constitution's original tolerance of racial restrictions on the right to vote and stands as a legal bulwark against the racial strife and ethnic balkanization that has troubled this country since its founding — and that to this day plagues this Nation and others around the globe. *See generally Holder v. Hall*, 512 U.S. 874, 894-95 (1994) (Thomas, J., concurring in judgment); *South Carolina v. Katzenbach*, 383 U.S. 301, 309-13 (1966).

Since 1978, however, the State of Hawaii has prohibited citizens of certain races, *because of their race*, from voting in elections for the Office of Hawaiian Affairs — a government office that controls and disburses a significant amount of state funds, formulates policy, and administers certain state lands. *See* Haw. Rev. Stat. § 13D-3(b) ("No person shall be eligible to register as a voter for the election of board members unless the person . . . is Hawaiian. . . ."). Hawaii excludes not just

Caucasians from voting in elections for the Office of Hawaiian Affairs, it turns away citizens who are African-Americans, Japanese-Americans, Chinese-Americans, and indeed members of all racial and ethnic groups except the preferred Hawaiians.

The primary question presented to this Court is whether Hawaii, by prohibiting individuals from voting in a state election *because of their race*, has violated the Fifteenth Amendment, which prohibits States from denying individuals the right to vote *because of their race*. To pose the question is to resolve the case. As this Court has stated, the Fifteenth Amendment is "unequivocal[]" and prohibits race-based voting qualifications (as well as facially race-neutral voting qualifications that are intended to harm members of a particular race). *Shaw v. Reno*, 509 U.S. 630, 639 (1993); *see City of Mobile v. Bolden*, 446 U.S. 55, 62 (1980); *Gomillion*, 364 U.S. at 339; *Smith v. Allwright*, 321 U.S. 649, 657 (1944); *Guinn*, 238 U.S. at 347; *cf. Chisom v. Roemer*, 501 U.S. 380, 392 (1991) ("*every election in which registered electors are permitted to vote*" is covered under § 2 of Voting Rights Act of 1965, which enforces the Fifteenth Amendment) (quotation omitted; emphasis added).

Hawaii has offered an array of historical and policy considerations in support of its racial voting scheme, primarily based on preserving the culture of Hawaiians. But all such arguments are, for purposes of the Fifteenth Amendment, nothing but diversions. Hawaii restricts the right to vote in a state election based on a citizen's race, and the clear and unequivocal language of the Fifteenth Amendment flatly prohibits such state action.

What is perhaps most telling about the unconstitutionality of Hawaii's racial voting qualification is that in the nearly 130 years since the Fifteenth Amendment was ratified — troubled though those years have been with respect to racial relations and racially motivated voting devices — no State so far as we are aware has thought it permissible to enact into law a facial

racial qualification on the right to vote in any state election. Indeed, several States, no doubt recognizing that the language of the Fifteenth Amendment was clear and unequivocal, resorted instead to pretext and subterfuge to try to evade what all understood to be the meaning of the Fifteenth Amendment. *See Shaw*, 509 U.S. at 639-40 (describing various forms of "[o]stensibly race-neutral devices" used "to deprive black voters of the franchise"); *see Gomillion*, 364 U.S. at 341; *Guinn*, 238 U.S. at 364-65.

In light of the plain conflict between Hawaii's racial qualification for voting and the clear language of the Fifteenth Amendment, the question that comes to the fore in this case focuses on the court of appeals: How did it go so far astray? The court of appeals recognized, after all, that the voter qualification at issue here was "expressly racial" and "clearly racial on its face." Pet. App. 10a, 15a. The court also acknowledged that the Fifteenth Amendment "squarely prohibits racially-based denials of the right to vote." Pet. App. 15a (quoting Laurence H. Tribe, *American Constitutional Law* 335 n.2 (2d ed. 1988)).

The court explained, however, that "restricting voter eligibility to Hawaiians cannot be understood without reference to what the vote is for." Pet. App. 11a. The court concluded that a state could allow racial restrictions on the right to vote when the underlying state office was, in essence, devoted to distributing funds for the benefit of a racially restricted class. Pet. App. 15a. The court held that such a scheme "does not deny non-Hawaiians the right to vote *in any meaningful sense*." Pet. App. 15a (emphasis added). The court did not explain, however, from what source it derived a "meaningful sense" exception to the Fifteenth Amendment's ban on racial voting qualifications, nor did it say how voting in elections to a state office that, among other things, controls and spends substantial sums of state money is not "meaningful."

The court said that it found guidance in cases in which this Court has held that limited special-purpose elections are consistent with the right to vote that the Court has inferred from the Fourteenth Amendment. *See Ball v. James*, 451 U.S. 355 (1981); *Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *cf. Reynolds v. Sims*, 377 U.S. 533 (1964). But in relying on those cases, the court of appeals overlooked a critical point: Those cases did not deal with *racial* restrictions on the right to vote. The Fifteenth Amendment places voting qualifications based on race in a constitutionally different class from voting qualifications based on non-suspect characteristics. Thus, the Constitution does not expressly provide that all citizens in a jurisdiction can vote in all elections (a point confirmed by the *Salyer* case), but it expressly prohibits denial of the right to vote in any state election *on account of race*. *Cf. Powers v. Ohio*, 499 U.S. 400, 409 (1991) ("An individual juror does not have a right to sit on any particular petit jury, but he or she does possess the right not to be excluded from one on account of race."); *Buchanan v. Warley*, 245 U.S. 60, 74-75, 82 (1917) (state can limit property rights, but cannot do so on the basis of race).

In sum, this Court's resolution of this case should be quite straightforward. Nearly 130 years after the Fifteenth Amendment's ratification, the State of Hawaii seeks the Court's blessing to strip an American citizen of his right to vote in a state election based on his race. The words of the Fifteenth Amendment mean what they say, however, and the Fifteenth Amendment thus flatly bars Hawaii's denial of the right to vote in a state election on account of race.

II. THE FOURTEENTH AMENDMENT PROHIBITS HAWAII'S RACIAL QUALIFICATION FOR VOTING IN ELECTIONS FOR THE OFFICE OF HAWAIIAN AFFAIRS.

Hawaii's racial restriction on voting also violates the Equal Protection Clause of Section 1 of the Fourteenth Amendment.

A. Racial Classifications Are Presumptively Invalid and Subject to Strict Scrutiny Under the Fourteenth Amendment.

The Equal Protection Clause of the Fourteenth Amendment, also ratified in the wake of the Civil War on July 9, 1868, provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." While not phrased in the plain and crystalline terms of the Fifteenth Amendment, the "central purpose" of the amendment is "to prevent the States from purposefully discriminating between individuals *on the basis of race*." *Shaw*, 509 U.S. at 642 (emphasis added).[4]

To be sure, the Court has not as yet adopted the most stringent rule for analyzing racial classifications under the Equal Protection Clause — that "only a social emergency rising to the level of imminent danger to life and limb . . . can justify an exception to the principle embedded in the Fourteenth Amendment that our Constitution is color-blind, and neither knows nor tolerates classes among citizens." *Croson*, 488 U.S.

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[4] *See Miller v. Johnson*, 515 U.S. 900, 904 (1995) ("central mandate is racial neutrality in governmental decisionmaking"); *Powers*, 499 U.S. at 415 (Fourteenth Amendment's mandate is that "race discrimination be eliminated from all official acts and proceedings of the State"); *Palmore v. Sidoti*, 466 U.S. 429, 432-33 (1984) ("A core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."); *Loving*, 388 U.S. at 10 ("The clear and central purpose of the Fourteenth Amendment was to eliminate all official state sources of invidious racial discrimination in the States."); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964) ("historical fact that the central purpose of the Fourteenth Amendment was to eliminate racial discrimination emanating from official sources in the States"); *Strauder v. West Virginia*, 100 U.S. 303, 307 (1880) ("What is this but declaring that the law in the States shall be the same for the black as for the white; that all persons, whether colored or white, shall stand equal before the laws of the States . . . .").

at 521 (Scalia, J., concurring in judgment) (quotation omitted).[5] The Court's decisions have nonetheless established that "[a] racial classification, regardless of purported motivation, is presumptively invalid and can be upheld only upon an extraordinary justification." *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 272 (1979). As a result, "all laws that classify citizens on the basis of race . . . are constitutionally suspect and must be strictly scrutinized." *Hunt v. Cromartie*, No. 98-85, 1999 WL 303677, at *4 (May 17, 1999); *see Adarand*, 515 U.S. at 235-36; *Shaw*, 509 U.S. at 642-43; *Croson*, 488 U.S. at 493-94 (plurality).

The Court has stressed that racial classifications must be strictly scrutinized because classifications of citizens solely on the basis of race "are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943). They "reinforce the belief, held by too many for too much of our history, that individuals should be judged by the color of their skin." *Shaw*, 509 U.S. at 657. They "embody stereotypes that treat individuals as the product of their race, evaluating their thoughts and efforts — their very worth as citizens — according to a criterion barred to the Government by history and the Constitution." *Miller*, 515 U.S. at 912 (quoting *Metro Broadcasting, Inc. v. FCC*, 497 U.S. 547, 604 (1990) (O'Connor, J., dissenting)). And they reflect "the demeaning notion that members of the defined racial groups ascribe to certain 'minority views' that must be different from

[5] *See also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 240-41 (1995) (Thomas, J., concurring); *Fullilove v. Klutznick*, 448 U.S. 448, 522-23 (1980) (Stewart, J., joined by Rehnquist, J., dissenting); *Defunis v. Odegaard*, 416 U.S. 312, 343-44 (1974) (Douglas, J., dissenting); *McLaughlin*, 379 U.S. at 198 (Stewart, J., joined by Douglas, J., concurring); *Bell v. Maryland*, 378 U.S. 226, 287-88 (1964) (Goldberg, J., joined by Warren, C.J., concurring); *Hirabayashi v. United States*, 320 U.S. 81, 110-11 (1943) (Murphy, J., concurring); *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting).

those of other citizens." *Johnson v. DeGrandy*, 512 U.S. 997, 1027 (1994) (Kennedy, J., concurring) (quotation omitted).[6]

Racial classifications are offensive to the Constitution for a more practical reason as well. There is no way to apply them without formal rules for deciding who is and is not a member of a given race and without some governing body to apply and enforce those rules. *Cf. Plessy*, 163 U.S. at 552. As Justice Stevens has emphasized, however, "the very attempt to define with precision a beneficiary's qualifying racial characteristics is repugnant to our constitutional ideals." *Fullilove*, 448 U.S. at 535 n.5 (Stevens, J., dissenting). Justice Stevens thus stated in *Fullilove* that a "serious effort" to "define racial classes" must "study precedents such as the First Regulation to the Reichs Citizenship Law of November 14, 1935." *Id.*; *see also Metro Broadcasting*, 497 U.S. at 633 n.1 (Kennedy, J., dissenting) (comparing racial set-aside to South African Population Registration Act). This case illustrates the point: The State of Hawaii has struggled mightily to define who exactly is a "Hawaiian," an enterprise that has led to a variety of conflicting definitions and generated numerous lawsuits.

Strict scrutiny under the Equal Protection Clause applies with particular force to racial classifications affecting the voting process. *See Shaw*, 509 U.S. at 644.[7] The Court has

[6] Strict scrutiny applies regardless of the race benefited or burdened because a "benign racial classification is a contradiction in terms," *Metro Broadcasting*, 497 U.S. at 609 (O'Connor, J., dissenting) (quotation omitted), and there is "no principled basis for deciding which groups would merit heightened judicial solicitude and which would not," *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 296 (1978) (Powell, J.). Strict scrutiny also applies, of course, even when the racial classification burdens or benefits the races equally. *Powers*, 499 U.S. at 410; *Brown v. Board of Education*, 347 U.S. 483, 494-95 (1954).

[7] *See Gomillion*, 364 U.S. at 349 (Whittaker, J., concurring); *see also City of Mobile*, 446 U.S. at 86 (Stevens, J., concurring in judgment) (*Gomillion*

(continued...)

stated that "[r]acial classifications *with respect to voting* carry particular dangers" – including "balkaniz[ing] us into competing racial factions." *Shaw*, 509 U.S. at 657 (emphasis added). "When the State assigns voters on the basis of race, it engages in the offensive and demeaning assumption that voters of a particular race, because of their race, think alike, share the same political interests, and will prefer the same candidates at the polls." *Miller*, 515 U.S. at 911-12 (quotation omitted); *cf. Batson v. Kentucky*, 476 U.S. 79, 97-98 (1986). As Judge Wisdom stated over a generation ago, "*If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth.*" *Anderson v. Martin*, 206 F. Supp. 700, 705 (E.D. La. 1962) (Wisdom, J., dissenting) (emphasis added), *rev'd*, 375 U.S. 399 (1964).[8]

B. The Equal Protection Clause Prohibits a Racial Classification Unless the Classification Is Necessary and Narrowly Tailored to Serve a Compelling Government Interest.

Hawaii's law facially discriminates on the basis of race in determining which voters are qualified to vote in elections for the Office of Hawaiian Affairs.[9] Because the intent, meaning, history, and policy of the Equal Protection Clause all suggest that the Constitution does not allow governmental racial

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[7] (...continued)
is "compelled by the Equal Protection Clause").

[8] The Justices who dissented in *Shaw* still would consider a "direct and outright deprivation of the right to vote" on account of race (as here) subject to the strictest scrutiny. *Shaw*, 509 U.S. at 659 (White, J., dissenting); *id.* at 682 (Souter, J., dissenting).

[9] When, as here, "the racial classification appears on the face of the statute," then "[n]o inquiry into legislative purpose is necessary" to determine whether the law is designed to harm members of a particular race. *Shaw*, 509 U.S. at 642; *see Hunt*, 1999 WL 303677; *cf. Washington v. Davis*, 426 U.S. 229 (1976).

classifications — or, at most, only rarely allows them — the Court has held that racial classifications such as Hawaii's racial voting qualification are "presumptively invalid" and subject to strict scrutiny under the Fourteenth Amendment, meaning that they can be upheld only if based upon an "extraordinary justification." *Feeney*, 442 U.S. at 272 (*quoted in Shaw*, 509 U.S. at 643-44). Under the strict scrutiny standard, racial classifications thus violate the Equal Protection Clause unless they are both necessary and narrowly tailored to serve a compelling state interest. *Shaw*, 509 U.S. at 643; *Croson*, 488 U.S. at 509 (plurality) (Only in the "*extreme case*" may "some form of narrowly tailored racial preference . . . be *necessary*.") (emphases added).[10]

These requirements impose a number of important barriers that a government entity must surmount before it may impose a racial classification. The rationale is simple: "If there is no duty to attempt . . . to measure the recovery by the wrong . . . our history will adequately support a legislative preference for almost any ethnic, religious, or racial group with the political strength to negotiate a piece of the action for its members." *Croson*, 488 U.S. at 510-11 (plurality) (quoting *Fullilove*, 448 U.S. at 539 (Stevens, J., dissenting)). Taken together, as

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[10] *See also Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 280 (1986) (plurality); *id.* at 286 (O'Connor, J., concurring); *Palmore*, 466 U.S. at 432 (classifications must be "necessary" to accomplishment of "compelling governmental interest"); *Fullilove*, 448 U.S. at 496 (Powell, J., concurring) ("racial classification . . . is constitutionally prohibited unless it is a necessary means of advancing a compelling governmental interest"); *Loving*, 388 U.S. at 11 (racial classifications, "if they are ever to be upheld, . . . must be shown to be necessary to the accomplishment of some permissible state objective"). In some cases, the Court has used the term "necessary"; in some cases, the Court has used the term "narrowly tailored"; and in some cases, the Court has used both terms. The Court's consistent analysis incorporates both ideas. The Court has made it clear, for example, that past discrimination does not justify a racial classification if race-neutral alternatives are available.

Justice Kennedy has pointed out, these stringent requirements explain why the strict scrutiny standard "operate[s] in a manner generally consistent with the imperative of race neutrality." *Croson*, 488 U.S. at 519 (Kennedy, J., concurring).

First, the government must show a compelling interest that justifies its racial classification. Except in situations where there is an imminent threat to life or limb (as in a prison race riot), racial classifications must be "strictly reserved for remedial settings." *Id.* at 494 (plurality); *Metro Broadcasting*, 497 U.S. at 612 (O'Connor, J., dissenting) ("Modern equal protection doctrine has recognized only one such [compelling] interest: remedying the effects of racial discrimination."); *Wygant*, 476 U.S. at 274-76 (plurality). Furthermore, the bare desire to remedy *societal* discrimination is too "amorphous" a concept of injury to qualify as a "compelling interest." *Croson*, 488 U.S. at 497 (plurality) (quoting *Bakke*, 438 U.S. at 307 (Powell, J.)); *see also Wygant*, 476 U.S. at 274 (plurality) ("This Court never has held that societal discrimination alone is sufficient to justify a racial classification."). In order for the government to show that the classification is truly remedial, the classification must be preceded by "judicial, legislative, or administrative findings of constitutional or statutory violations." *Croson*, 488 U.S. at 497 (plurality) (quoting *Bakke*, 438 U.S. at 308-09 (Powell, J.)).[11] In *Croson*, for example, the Court explained that there was "nothing approaching . . . a constitutional or statutory violation by anyone in the Richmond construction industry." *Id.* at 500.

Second, the government must show that the classification remedies discrimination that was committed both *within that jurisdiction*, and *within the industry or field* in which the

[11] Any legislative or executive findings must be strictly scrutinized, for "[t]he history of racial classifications in this country suggests that blind judicial deference to legislative or executive pronouncements of necessity has no place in equal protection analysis." *Croson*, 488 U.S. at 501.

classification is imposed (such as school segregation in a district). *Id.* at 500, 504-05. The Court explained the point in *Croson*: "The 'evidence' relied upon by the dissent, the history of school desegregation in Richmond . . . does little to define the scope of any injury to *minority contractors in Richmond* or the necessary remedy." *Id.* at 505 (emphasis added). The Court added that "none of the evidence presented by the city points to any identified discrimination in the *Richmond construction industry*." *Id.* (emphasis added). The Court has "never approved the extrapolation of discrimination in one jurisdiction from the experience of another." *Id.*

Third, the government must show that the racial classification is necessary in the sense that race-neutral remedies have been or would be ineffective in remedying the discrimination. *Adarand*, 515 U.S. at 237-38 (court of appeals "did not address the question of narrow tailoring in terms of our strict scrutiny cases, by asking, for example, whether there was any consideration of the use of race-neutral means") (quotation omitted); *Croson*, 488 U.S. at 507 ("[T]here does not appear to have been any consideration of the use of race-neutral means to increase minority business participation in city contracting."); *United States v. Paradise*, 480 U.S. 149, 171 (1987) ("In determining whether race-conscious remedies are appropriate, we look to several factors, including the necessity for the relief and the efficacy of alternative remedies."); *id.* at 201 (O'Connor, J., dissenting) ("strict scrutiny requires . . . that the District Court expressly evaluate the available alternative remedies."). The decision in *Croson* illustrated the importance of this requirement: Only in the "*extreme case*" may "some form of narrowly tailored racial preference . . . be *necessary* . . . ." *Croson*, 488 U.S. at 509 (plurality) (emphases added). In *Croson*, the Court stated that a racial set-aside was not necessary because a "race-neutral program of city financing for small firms would, a fortiori, lead to greater minority participation" and remedy any discrimination that had occurred. *Id.* at 507.

Fourth, the government must show that it cannot devise an individualized procedure to "tailor remedial relief to those who truly have suffered the effects of prior discrimination" — in other words, that the racial classification is not simply a product of "administrative convenience." *Id.* at 508; *cf. Korematsu*, 323 U.S. at 241 (Murphy, J., dissenting) ("[n]o adequate reason is given for the failure to treat these Japanese Americans on an individual basis by holding investigations and hearings to separate the loyal from the disloyal"). The interest in "avoiding the bureaucratic effort necessary to tailor remedial relief to those who truly have suffered the effects of prior discrimination cannot justify a rigid line drawn on the basis of a suspect classification." *Croson*, 488 U.S. at 508.

Fifth, the government must show that it has minimized harm to innocent members of other racial groups. For this reason, a specific numerical quota, or outright racial exclusion, rarely (if ever) could satisfy the narrow tailoring requirement. *See id.* The Court applied this principle in *Croson*: "Under Richmond's scheme, a successful black, Hispanic, or Oriental entrepreneur . . . enjoys an absolute preference over other citizens based solely on their race. We think it *obvious* that such a program is not narrowly tailored to remedy the effects of prior discrimination." *Id.* (emphasis added); *see also id.* at 515 (Stevens, J., concurring) ("Richmond City Council has merely engaged in the type of stereotypical analysis that is a hallmark of violations of the Equal Protection Clause.").

Sixth, the government must show that the racial classification is tailored in terms of duration: that it "will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 238 (quoting *Fullilove*, 448 U.S. at 513 (Powell, J., concurring)).

C. Hawaii's Racial Voting Qualification Does Not Meet the Requirements of Strict Scrutiny.

Based on the foregoing principles, it is plain that Hawaii's racial voting qualification violates the Equal Protection Clause for any one of a host of alternative and independent reasons.

At the outset, Justice Ginsburg's opinion in *Adarand* identified the simplest reason for holding this racial voting qualification violative of the Equal Protection Clause. As she explained, while this Court has not as yet held that the strict scrutiny standard is automatically fatal for *all* racial classifications, at a minimum "the strict scrutiny standard" is "fatal for classifications burdening groups that have suffered discrimination in our society." *Adarand*, 515 U.S. at 275 (Ginsburg, J., dissenting). The principle identified by Justice Ginsburg applies here. In elections for the Office of Hawaiian Affairs, Hawaii turns away would-be voters who are, for example, African-Americans, Japanese-Americans, Chinese-Americans, Mexican-Americans, and even American Indians — all of whom belong to racial groups whose members "have suffered discrimination in our society" and some of whom have suffered discrimination *in Hawaii*. As Justice Ginsburg rightly suggested, therefore, the strict scrutiny analysis is "fatal" to Hawaii's racial voting qualification, and no further equal protection analysis is necessary.

Apart from that threshold point, the racial classification here fails to meet *any* of the specific requirements (much less all of them) that the government must meet in order to show that a racial classification is necessary and narrowly tailored to serve a compelling governmental interest.

First, Hawaii has not shown that its racial voting qualification remedies prior discrimination. In particular, Hawaii has not identified any competent judicial, legislative, or administrative findings of constitutional or statutory violations by any party to justify its racial voting qualification.

Second, and as a necessary consequence of the first point, Hawaii obviously has not shown that its racial voting qualification remedies a prior denial or infringement of the ability of Hawaiians *to vote in Hawaii*. Hawaii's racial classification thus fails to meet a critical requirement under this Court's equal protection jurisprudence for a racial classification — that it serve a compelling governmental interest in remedying prior discrimination *in the jurisdiction and field* in which the classification is imposed.

Third, even had the State shown prior abridgements on the ability of Hawaiians to vote, it has not shown that a race-based voting scheme is necessary to remedy that discrimination. Indeed, an outright denial of the right to vote on the basis of race can *never* be sufficiently necessary to remedy past discrimination in voting. To be sure, there is a compelling governmental interest in remedying prior racial restrictions on the right to vote, but the constitutionally authorized remedy is imposition of a race-neutral voting scheme (and, if needed, the elimination of various race-neutral voting devices that can be a pretext for racial discrimination). *See, e.g.*, 42 U.S.C. § 1973; *Fullilove*, 448 U.S. at 546-47 (Stevens, J., dissenting) (Voting Rights Act, if it required that 10% of elected officials be minorities, "would merely create the kind of inequality that an impartial sovereign cannot tolerate"); *cf. Bazemore v. Friday*, 478 U.S. 385, 407-09 (1986) (race-neutral admissions policy is constitutionally proper remedy for club's prior discriminatory admissions). In this regard, we cannot improve upon Judge Wisdom: "If there is one area above all others where the Constitution is color-blind, it is the area of state action with respect to the ballot and the voting booth." *Anderson*, 206 F. Supp. at 705 (Wisdom, J., dissenting).

Fourth, even assuming prior denials of the right to vote, Hawaii has not shown that it is unable to devise an individualized procedure to "tailor relief to those who truly have suffered the effects" of any prior voting discrimination — in other words, to show that the racial classification is not simply a product of "administrative convenience" in grouping together all Hawaiians. *Cf. Croson*, 488 U.S. at 508.

Fifth, Hawaii has imposed a 100% racial voting set-aside in OHA elections that absolutely excludes members of races other than Hawaiian from the ballot. Faced with a 30% set-aside in *Croson*, the Court found "it *obvious* that such a program [wa]s not narrowly tailored to remedy the effects of prior discrimination." *Id.* at 508 (emphasis added). Given Hawaii's 100% exclusion of individuals who are not Hawaiian from the ballot in OHA elections (particularly when combined with the lack of findings of prior discrimination), the same conclusion applies here *a fortiori*.

Sixth, Hawaii's racial qualification is not limited in time. The State established it in 1978, and it is scheduled to last indefinitely. This qualification is not tailored "such that it will not last longer than the discriminatory effects it is designed to eliminate." *Adarand*, 515 U.S. at 238 (quotation omitted).

In sum, Hawaii's law satisfies none of the requirements this Court has imposed for holding a racial classification permissible under the Equal Protection Clause.

D. Hawaii's Arguments Based on Preserving the Culture of Hawaiians and on a Trust Relationship With Hawaiians Do Not Justify Hawaii's Racial Voting Qualification.

The State has constructed a tortured defense of its racial voting qualification that links (a) the *racial* restriction on the beneficiaries of OHA-controlled funds, (b) the *racial* qualifications to be an OHA officer, and (c) the *racial* qualifications for voting in elections for OHA officers. To begin with, this defense does not purport to meet the requirements this Court has imposed for racial classifications.

Even addressing the State's argument on its own terms, moreover, the short answer to it is fairly simple: Three blatant

constitutional wrongs do not make a right. A massive unconstitutional scheme of racially restricted distribution of state funds, racial restrictions on serving in the state office that oversees and distributes those funds, and racially restricted elections to that office hardly makes the State's voting restriction *more* constitutionally palatable. *See* Stuart M. Benjamin, *Equal Protection and the Special Relationship: The Case of Native Hawaiians*, 106 Yale L.J. 537, 594 (1996) ("It seems unlikely that many, if any, of Hawaii's current programs singling out Native Hawaiians could meet [strict scrutiny] standards. The compelling interest requirement alone would pose an enormous hurdle.").

Hawaii has suggested that the racial voting qualification is constitutional because the racial restriction on the use of the OHA-controlled funds is constitutional and is not challenged here. As a matter of logic, that conclusion makes no sense even if the premise is accepted. If a state refused to hire a black teacher for an all-white school in 1952 because of his race, it could not have defended against a claimed equal protection violation by saying that the racial restriction on hiring was constitutional because the racially segregated schools were not challenged and had not yet been declared unconstitutional.

In addition, the racial restriction on the use of funds is itself unnecessary and not narrowly tailored to serve a compelling interest. Even assuming, for example, that the average Hawaiian suffers poverty to a greater extent than the average individual of another race, the State can institute a race-neutral social welfare program. It cannot engage, however, in a racially restricted distribution of funds that is both over-inclusive and under-inclusive.

Even if the State had a justification to pay monies to members of a racial group because of their race, a state does not have a compelling interest in establishing a racially restricted office *whose members are elected in racially restricted elections* in order to administer the program. In that regard, it

bears emphasis that a racial *voting* qualification is perhaps the most pernicious of all racial classifications because it implies that "individuals of the same race share a single political interest. The view that they do is based on the demeaning notion that members of the defined racial groups ascribe to certain minority views that must be different from those of other citizens." *Miller*, 515 U.S. at 914 (quotation omitted). This is the "precise use of race as a proxy the Constitution prohibits." *Id.; cf. Powers*, 499 U.S. at 410. Here, only by assuming that *all* Hawaiians think differently and vote differently from *all* other Hawaiian citizens can the categorical racial voting qualification be explained. Such an offensive assumption is patently unconstitutional under this Court's precedent.

Hawaii has invoked the term "trust" to describe its scheme and the term "trust lands" to describe lands transferred to the State by the 1959 Admission Act. But the terminology is simply camouflage for Hawaii's 1978 decision that certain state funds (derived both from the state lands and from other state funds) will be used to benefit a racially defined group — even though the State is free to use those funds in a race-neutral way.[12] In any event, the existence of trust lands does not justify a racial qualification *to vote* in *state* elections for the *state* office that oversees and administers the lands.

Hawaii also has explained — correctly — that Hawaiians share a common heritage and background that they, like many Americans of all backgrounds, cherish and celebrate. But the State has no right to engage in a racially restricted distribution of state funds, or racial classifications on the right to vote in a

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[12] Even were the State compelled by federal law to impose a racial classification (which it is not), *Adarand* establishes that the constitutional analysis would remain the same.

state election, simply to preserve a particular "culture."[13] As Justice Kennedy has explained, "There is more than a fine line, however, between the voluntary association that leads to a political community . . . and the forced separation that occurs when the government draws explicit political boundaries . . . ." *Kiryas Joel*, 512 U.S. at 730 (Kennedy, J., concurring in judgment).

The dangers of allowing a state's cultural justifications to supersede the limitations of the Equal Protection Clause are quite evident: One need only change the state from Hawaii to Louisiana and the year from 1999 to 1896. *See Plessy*, 163 U.S. at 550 (legislature is free "to act with reference to the established usages, customs, and traditions of the people"). This Court has forbidden that kind of "cultural" justification for racial classifications in cases ranging from *Brown v. Board of Education* to *Loving v. Virginia*. Now is no time to return to an era when "cultural" justifications could trump the dictates of the Equal Protection Clause. *Cf. Loving*, 388 U.S. at 11 (ban on interracial marriage designed to "maintain White Supremacy").

E. Hawaii's Analogy of Hawaiians to American Indian Tribes Is Historically, Legally, and Factually Flawed.

The lower courts suggested that American Indian tribes are exempt from the Equal Protection Clause (at least, treatment of Indian tribes that facilitates self-government is exempt), and that Hawaiians as a group are sufficiently similar to American Indian tribes that discrimination in favor of Hawaiians can be

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[13] As two leading political and social commentators said of Hawaii: "It is one thing to celebrate a cultural heritage and a sometimes tragic history, but it is another, as Canadians have learned, to widen splits and schisms in a state that more than almost any place in the world has proved that diverse people can live amicably and successfully together." Michael Barone & Grant Ujifusa, *The Almanac of American Politics* 439 (1998).

permitted under the Equal Protection Clause. *See, e.g.*, Pet. App. 13a-14a, 17a.

This argument is flawed at every turn. To begin with, it misconceives the basis for differential treatment of American Indian tribes under the Constitution. And it simultaneously creates from whole cloth a constitutional authorization for members of other racial and ethnic groups (for example, African-Americans, Latino-Americans, and Korean-Americans) to assert *ipse dixit* that they are "similar to American Indian tribes" for purposes of equal protection analysis.

1. American Indian tribes are a distinctive category in our law. *See Cherokee Nation v. Georgia*, 30 U.S. 1 (1831). The tribes are separate sovereigns within the United States — and have been so considered since before the Constitution was ratified. The Commerce Clause thus provides that "[t]he Congress shall have Power . . . [t]o regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes." U.S. Const. art. i, § 8. In addition, the Treaty Clause, which grants the President "Power, by and with the Advice and Consent of the Senate, to make Treaties," has been a source of authority for the federal government to deal with American Indian tribes as sovereigns. U.S. Const. art. ii, § 2.

As mandated by the Constitution, this Court has drawn a clear constitutional distinction between (a) laws that benefit or burden Indian *tribes* (or *tribal members*) with respect to self-governance or activities on or near an Indian reservation and (b) laws that burden or benefit Indians solely *because of their race* and do not relate to tribal activities (in which case, American Indians are treated like members of other races).

Equal protection strict scrutiny thus applies to classifications by race of individuals who happen to be American Indian so long as the classification in question does not relate to their tribal membership and their activities on or near the reservation. In both *Adarand* and *Croson*, for

example, the Court held that a racial preference program that gave preferences to American Indians, as well as members of other racial groups, was subject to strict scrutiny. As the Court stated in *Croson*, "[t]here is absolutely no evidence of past discrimination against Spanish-speaking, Oriental, *Indian*, Eskimo, or Aleut persons." 488 U.S. at 506 (emphasis added). In *Adarand* as well, the program provided a preference for "Native Americans," but the Court held that *all* racial classifications are subject to strict scrutiny. (In dissent, Justice Stevens raised the subject of American Indians, 515 U.S. at 244-45 n.3, but the Court did not distinguish American Indians from the other racial groups.) So, too, in both *Fullilove* and *Metro Broadcasting*, the laws at issue gave a preference to American Indians, *see Metro Broadcasting*, 497 U.S. at 553 n.1; *Fullilove*, 448 U.S. at 454, but no member of this Court suggested that a racial preference for African-Americans is more strictly scrutinized than a preference for American Indians.

2. In holding Hawaii's special treatment of Hawaiians consistent with the Equal Protection Clause, the courts below erroneously relied in part on this Court's decision in *Morton v. Mancari*, 417 U.S. 535 (1974). In that case, the Court upheld a hiring preference granted to tribal Indians for employment in the Bureau of Indian Affairs.

Three points about *Mancari* are critical, however, and completely undercut the lower courts' reliance on it. *First*, the Court in *Mancari* stated that the justification for differential treatment for Indian tribes stemmed not from some idiosyncratic ordering of different racial groups, but "from the Constitution itself" – namely, the Indian Commerce Clause and the Treaty Clause. *Id.* at 552; *see also Adarand*, 515 U.S. at 244-45 n.3 (Stevens, J., dissenting) (*Mancari* relied in part on "plenary power of Congress to legislate on behalf of Indian tribes"); *United States v. Antelope*, 430 U.S. 641, 646 (1977) (*Mancari* "involved preferences . . . directly promoting Indian

interests in self-government. . . . Federal regulation of Indian tribes . . . is governance of once-sovereign political communities; *it is not to be viewed as legislation of a 'racial' group consisting of Indians.*") (quotation omitted; emphasis added). So, too, the government's brief in *Mancari*, advocating the position that the Court adopted, cautioned that the Constitution "permits special arrangements [with respect to Indian tribes] *that might not be appropriate with respect to other groups*." Br. for Appellants, No. 73-362, at 33 (emphasis added). By linking its decision to the Indian Commerce Clause, the Court accepted that argument. The Court did not adopt, by contrast, the suggestion of an amicus curiae who argued that *benign* racial preferences are not subject to strict scrutiny, and that preferences to "members of a minority group" such as American Indians "are constitutional." Br. for Amicus Curiae Mexican American Legal Defense and Educational Fund, Nos. 73-362, 73-364, at 22-23.

Second, consistent with its view of the proper scope of the equal protection exception for Indian tribes embodied in the Indian Commerce and Treaty Clauses, the *Mancari* Court went out of its way to make clear that the BIA preference applied only to Indians who were members of Indian tribes and thus "operate[d] to exclude many individuals who are racially to be classified as Indians." *Mancari*, 417 U.S. at 554 n.24. In particular, the Court relied on the definition of Indian used in BIA regulations, which expressly conditioned the preference on tribal membership. *Id.*; *see* Benjamin, 106 Yale L.J. at 612 n.38 ("One of the most important aspects of the Court's conclusion was left unstated: The Court ignored the statutory definition of 'Indian' and looked only to the BIA regulation's definition."); *see also id.* at n.121. The government stressed at oral argument, moreover, that the "preference is limited to Indians who are members of federally recognized [tribes]." Tr. of Oral Arg., Nos. 73-362, 73-364, at 7. The government pointed out that members of terminated tribes or never-recognized tribes were not eligible for the preference and noted

that "there are many Indians, many people who racially could be considered an Indian who don't get this preference." *Id.* at 13.

Third, the Court treated the preference as an aspect of constitutionally authorized Indian self-governance. *See* 417 U.S. at 553 (preference provision designed to give "Indians a greater control of their own destinies"). Indeed, as the government pointed out at argument, some 11,500 BIA employees out of approximately 14,000 at the time worked on the reservations. Tr. of Oral Arg. at 5-6. Moreover, the preference had actually begun as a substitute for a proposal to provide Indian tribes an absolute veto over any person the BIA proposed to send to work on the reservation. *Id.* at 12. The Court took all of that into account, noting that an "obviously more difficult question . . . would be presented" by a general Indian preference in government employment. 417 U.S. at 554.[14]

In reaching its conclusion, the Court stated that the BIA classification was not "in this sense" a "racial" preference. *Id.* at 553 & n.24. By that, the Court clearly meant that a classification involving Indian tribes (or involving Indian tribal members engaged in activities of self-governance or activities on or near a reservation) must be analyzed differently from purely racial classifications.

Mancari is thus simply another in the line of cases in which the Court has held that "the unique legal status of Indian tribes under federal law permits the Federal Government to enact legislation singling out tribal Indians, legislation *that*

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[14] That "question," which was unanswered at the time, was whether the same level of scrutiny afforded racial discrimination *against* minorities would apply to racial preferences *for* minorities — a question before the Court that Term, *Defunis v. Odegaard*, 416 U.S. 312 (1974), and which was subsequently addressed in cases such as *Bakke*, *Fullilove*, *Croson*, and *Adarand*.

might otherwise be constitutionally offensive." *Washington v. Confederated Bands & Tribes of Yakima Indian Nation*, 439 U.S. 463, 500-01 (1979) (quotation omitted; emphasis added).

3. Hawaii's attempts to analogize Hawaiians to Indian tribes for purposes of this case are unavailing for two main reasons.

First, the Constitution does not contain a Hawaiian Commerce Clause, but only an Indian Commerce Clause. Pet. App. 14a. Under the Constitution, therefore, a state's differential treatment of Hawaiians is no more acceptable than a state's differential treatment of Croatian-Americans or African-Americans or Italian-Americans.

Second, Hawaiians are not a federally recognized Indian tribe such that Hawaiians could receive the same treatment as American Indian tribes under the Constitution. Since the annexation in 1898, the United States has not dealt with Hawaiians as a sovereign nation. To be sure, certain federal statutes refer to Hawaiians, just as certain statutes refer to African-Americans, but Congress has never established that Hawaiians are an Indian tribe. This is not a trivial point. Without such recognition, a group of people united by race or ethnicity is not entitled to the same treatment as an American Indian *tribe*. As the BIA puts it, express federal recognition as a tribe is a "prerequisite to the protection, services, and benefits of the Federal government available to Indian tribes by virtue of their status as tribes." 25 C.F.R. § 83.2; *see* Rachael Paschal, *The Imprimatur of Recognition: American Indian Tribes and the Federal Acknowledgment Process*, 66 Wash. L. Rev. 209, 215-16 (1991).

As a matter of law and tradition, moreover, federal courts do not grant tribal status that neither Congress nor the Executive has granted. *United States v. Holliday*, 70 U.S. 407, 419 (1865); *see Cherokee Nation of Okla. v. Babbitt*, 117 F.3d

1489, 1496 (D.C. Cir. 1997). Therefore, this Court cannot simply declare that Hawaiians are an American Indian tribe.

Indeed, the constitutional constraints on Congress and the Executive in recognizing tribes, as well as existing BIA regulations, establish that Hawaiians could not possibly qualify as a tribe. *See* 25 C.F.R. § 83; *Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985) (group of Hawaiians not a tribe and thus could not sue under jurisdictional statute granting Indian tribes right to sue); Benjamin, 106 Yale L.J. at 574, 576 ("Native Hawaiians are not organized into any entity that can reasonably be called a tribe" and "there is little reason to suppose that Native Hawaiians would satisfy any definition of 'Indian tribe' . . . ."). Even the courts below recognized that Hawaiians have not and could not at this time receive formal recognition as an Indian tribe. Pet. App. 14a.

In any event, even were Hawaiians a recognized Indian tribe, the OHA's racial restriction on voting in elections for a *state* government office dealing with such an "Indian tribe" would still be unconstitutional. The "unique legal status of Indian tribes under federal law permits the *Federal Government* to enact legislation singling out tribal Indians, . . . [but] *States do not enjoy the same unique relationship with Indians* . . . ." *Yakima Nation*, 439 U.S. at 500-01 (quotation omitted; emphases added).

For all of these reasons, the State's attempt to analogize Hawaiians to American Indians does not justify its racial voting qualification in this case.

CONCLUSION

For the foregoing reasons, as well as those set forth in petitioner's brief, the decision of the court of appeals should be reversed.

Respectfully submitted.

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF *AMICI CURIAE*, THE HOU HAWAIIANS AND MAUI LOA, NATIVE HAWAIIAN BENEFICIARIES

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BRIEF OF *AMICI CURIAE*, THE HOU HAWAIIANS AND MAUI LOA, NATIVE HAWAIIAN BENEFICIARIES

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

I. INTEREST OF AMICI.

The Hou Hawaiians are a native Hawaiian Ohana (tribal body or extended family group), which have been advocating the interests of native Hawaiian applicants for Hawaiian homestead lands and entitlements under § 5(f) of the Hawaii Admissions Act[1], before courts, legislatures and administra-

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[1] Section § 5(f) of the Hawaii Admissions Act provides as follows:

(f) The lands granted to the State of Hawaii by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, shall be held by said State as a public trust for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public

tive agencies, since 1975. THE HOU HAWAIIANS were founded in that year, by their chief, MAUI LOA, born Doctor Nui Loa Price.

Chief MAUI LOA is a well known ethnic artist and craftsman who, together with his deceased father, Kamuela Price, has spent much of his time over the past 24 years advocating justice for native Hawaiian people. He is a "native Hawaiian" of 50 percent aboriginal blood, as defined in § 201(a)(7) of the Hawaiian Homes Commission Act (H.H.C.A.) and § 5(f) of the Hawaii Admissions Act, and has been a registered applicant with the Hawaii State Department of Hawaiian Home Lands (DHHL) for a Hawaiian homestead allotment, since 1974.

Amici are responsible for the establishment of the Federal--State Task Force on the Hawaiian Homes Commission Act, in 1983, as part of the settlement of *Price v. Department of Justice*, C.A. No. 80-2794 (D.D.C.), in the United States

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improvements, and for the provision of lands for public use. Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. The schools and other educational institutions supported, in whole or in part, out of such public trust shall forever remain under the exclusive control of said State; and no part of the proceeds or income from the lands granted under this Act shall be used for the support of any sectarian or denominational school, college, or university."

73 Stat. 6.

Section § 201(a)(7) of the Hawaiian Homes Commission Act, 1920, defines the term "native Hawaiian" as follows:

(7) The term "native Hawaiian" means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778.

42 Stat. 108.

District Court for the District of Columbia. Kamuela Price was appointed by then Gov. George Ariyoshi, as a member of the Task Force. Through the efforts of the Task Force some 30,000 acres of homelands which had been appropriated for other uses by the State were returned to the jurisdiction of DHHL.

Amici have appealed seven times to the U.S Court of Appeals from dismissal of five suits filed in the United States District Court for the District of Hawaii against the State of Hawaii and various state officers to enforce the rights of native Hawaiians conferred by Congress in §§ 4 and 5(f) of the Hawaii Admissions Act. These cases are: *Price v. State of Hawaii*, 764 F.2d 623, 625-626 (9th Cir. 1985), *cert.den.* 474 U.S. 1055, 106 S.Ct. 793, 88 L.Ed.2d 771 (1986) (*Price I*); *Price v. Akaka*, 928 F.2d 824, 828 (9th Cir.), *cert. denied*, 502 U.S. 967, 112 S.Ct. 436, 116 L.Ed.2d 455 (1991), appeal after remand, 3 F.3d 1220, (9th Cir.1993), *cert. denied*, 511 U.S. 1070, 114 S.Ct. 1645, 128 L.Ed.2d 365 (1994); *Price v. Hawaii*, 921 F.2d 950 (9th Cir. 1990); *Price v. Hawaii*, 939 F.2d 702 (9th Cir.1991), *cert. denied*, 503 U.S. 938, 112 S.Ct. 1480, 117 L.Ed.2d 622 (1992) appeal after remand, 5 F.3d 539 (9th Cir. 1993); *The Hou Hawaiians v. Cayetano*, C.A. No. 98-15402 (9th Cir.).

Amici respectfully submit this brief to address the issues of the case from the point of view of the "native Hawaiian" beneficiaries of the § 5(f) trust, who are not adequately represented by any of the parties to the case.

II. SUMMARY OF THE ARGUMENT.

A. The classification of "native Hawaiians" as beneficiaries to the Hawaiian Homes Commission Act and § 5(f) trust is not a racial classification. It is a classification based upon kinship to a group of people who were unjustly and wrongly deprived of their one-third undivided interest in 1.4 million

acres of land title to which is now held by the State of Hawaii.

B. The Office of Hawaiian Affairs represents Hawaiians, ninety percent of whom are not "native Hawaiians." As a result of this conflict of interest, OHA has wrongfully accumulated over $300 million of § 5(f) trust income intended by Congress to be used for the betterment of the condition of "native Hawaiians" while it has wrongfully been trying to change the definition of "native Hawaiian" to include all Hawaiians.

The premise upon which the Ninth Circuit based its decision is false. OHA does not represent the "native Hawaiian" beneficiaries of H.H.C.A and the § 5(f) trust. There is no identity of interests between the voters for OHA trustees and the beneficiaries of the § 5(f) trust.

III. ARGUMENT.

A. Definition of "native Hawaiian" in HHCA and Admissions Act is not a racial classification.

Petitioner has attacked the restriction of voter eligibility as being an unconstitutional racial classification in violation of the Fifteenth and Fourteenth Amendments to the United States Constitution. The Court of Appeals agreed that the provisions in the Hawaii Constitution establishing OHA and the voter qualifications contained in H.R.S., § 13D-3 "contain a racial classification on their face." *Rice v. Cayetano*, 146 F.3d. 1075, 1079 (9th Cir. 1998).

Since these classifications are derived from the definition of "native Hawaiian" contained in § 5(f) and H.H.C.A., it might be inferred therefrom that these latter provisions also contain racial classifications on their face. *Amici* respectfully submit that this is not the case.

The classification of "native Hawaiians" as beneficiaries to the Hawaiian Homes Commission Act and § 5(f) trust is

not a racial classification. It is a classification based upon kinship to a group of people who were unjustly and wrongly deprived of their one-third undivided interest in 1.4 million acres of land title to which is now held by the State of Hawaii.

In 1778, upon arrival of Capt. James Cooke in the Sandwich Islands the native Hawaiian population exceeded 300,000. Wright, Theon, *The Disenchanted Isles,* The Dial Press, New York (1972), p. 68. It is generally accepted that there was then in existence a feudal type of land ownership system, in which all of the land was owned by the King and granted by him to his chiefs known as *konohikis*, and by them in turn to the tenant farmers. *See* Chinen, Jon Jitsuzo, "Original Land Titles in Hawaii", Library of Congress No. 61-17314 (1961), p. 1; Cannelora, Louis, "The Origin of Hawaii Land Titles and of the Rights of Native Tenants", Security Title Corp., Honolulu, Hawaii (1974), p. 1.

Even then, it could not be considered a true feudal system, as the tenants were considered to have "rights" with respect to the land. This was recognized in the first Constitution of the Kingdom of Hawaii adopted in 1840. As provided therein:

> "Kamehameha I, was the founder of the kingdom, and to him belonged all the land from one end of the Islands to the other, *though it was not his own private property. It belonged to the chiefs and the people in common,* of whom Kamehameha I was the head, and had the management of landed property."

State v. Zimring, 58 Haw. 106, 111 (1977) quoting Fundamental Law of Hawaii (1904) at 3 quoting The Constitution of 1840.

This shows that the King held title merely as trustee for the use and benefit of the beneficiaries, the *konohikis* and

people.

On December 10, 1845, the Board of Commissioners to Quiet Land Titles, commonly known as the Land Commission was established to adjudicate and settle disputes over titles of real property. Cannelora, *supra,* p. 7. It was recognized in the Principals of the Land Commission as well as the Privy Counsel that the ownership of the land at that time was held in equal one-third undivided interests by the King, the *konohiki* landlords and the tenants living on the land. Cannelora, *supra*, pp. 10, 12. *See also Thurston v. Bishop,* 7 Haw. 421, 430 (1888).

The problem was that the Land Commission had no means to divide these interests, so that fee simple ownership of land could not be obtained unless all of these parties joined in the deed. In order to solve this problem the King and *konohikis* divided their lands between themselves in what is known as The Great Mahele. This was actually a series of divisions between the King and 245 *konohikis* made between January 27, 1848 and March 7, 1848, which allowed the *konohiki* to take his or her claim to the Land Commission and obtain title to the land subject to the rights of the native tenants. Cannelora, *supra,* p. 13.

Native tenants were not able to obtain title to their interests until 1850, when legislation was enacted allowing them to present *kuleana* claims to the Land Commission. Cannelora, *supra,* 17-19. But the law did not favor the granting of such claims. First, native tenants were less well educated and less informed than the *konohiki* class and may not have been aware of their right to obtain title or the means to perfect it. Second, native tenants were given only a 4 and one-half year period within which to file their claims, while *konohikis* were given up to 49 years. Cannelora, *supra*, p. 19. Third, native tenants were required to incur the considerable expense of a survey of their claim, while *konohikis* were not. *Id.* As a result, only approximately 28,000 acres of land—far less than the one-third interest that had previously been recognized—was awarded to native tenants under this provision. Fuchs, Lawrence H., *Hawaii Pono: A Social History,* Harcourt, Brace & World, Inc., New York (1961), p. 257.

Thus, this provision purportedly to allow native tenants to obtain fee simple title to their land actually operated to extinguish the claims of the vast majority of Hawaiian people who failed to go through the process of surveying and registering *kuleana* claims. As a result, by 1920, native Hawaiians were "a landless people in the country of their forefathers." Sen. Doc. No. 151, 75th Cong., 3d Sess, Serial Set 10247 (Jan. 5, 1938), pp. 81-83. While the government held 1.8 million acres of land, an undivided one-third interest in which had once belonged to native tenants who had failed to perfect their claims under the *kuleana* law.

In order to redress this injustice and rehabilitate the native Hawaiian people, Congress enacted the HHCA. By this act, approximately 200,000 acres of land, designated "available lands", were set aside to be awarded to native Hawaiians as 99-year leasehold homesteads at a rental of one dollar per year. Upon Statehood, § 4 of the Admissions Act required the State to adopt H.H.C.A. as part of its constitution and imposed the § 5(f) trust in favor of "native Hawaiians", in part, upon 1.4 million acres of land ceded to the state.

That the classification is not a racial one can be seen simply by changing the date and place contained in the definition of "native Hawaiian". Would it be a racial classification to define "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to *1978*? Clearly,

not. Would it be a racial classification to define "native Hawaiian" as any descendant of not less than one-half part of the blood of the races inhabiting the British Islands previous to 1066? Clearly, not.

The definition was crafted in a way to compensate the heirs of those people who had lost their land when a Western legal system was imposed upon them against their will. The definition does not include Tahitians or Samoans, or other people of the Polynesian race who were not inhabitants of the Hawaiian Islands at the time that Captain Cook arrived upon their shores.

The benefits conferred by H.H.C.A. and the § 5(f) trust upon "native Hawaiians" are no more a racial classification than the law providing compensation to Japanese internees during World War II.

Petitioner can properly be excluded from the class of beneficiaries to H.H.C.A and special beneficiaries of § 5(f) because he is not a descendant of not less than one-half part of the blood of the owners of an undivided one-third interest in the trust corpus prior to 1778.

B. OHA does not represent "native Hawaiian" beneficiaries to the § 5(f) trust.

Concluding that the definition of "native Hawaiian" in H.H.C.A. is not a racial classification does not dispose of Petitioner's claim of entitlement to vote for OHA trustees. He also claims to be deprived of equal protection of the law in violation of the Fourteenth Amendment. The state attempts to justify this classification by arguing that there is an identity between the electors and beneficiaries of the trust and that Petitioner has no interest in the management or disposition of the trust funds. The Court of Appeals agreed with the State.

As provided by H.R.S., §§ 13D-1 and § 13D-3(b)(1), the

trustees of the Office of Hawaiian Affairs are elected by "Hawaiians." On their face, these provisions do not preclude Petitioner from voting for OHA trustees, because H.R.S., Chapter 13 does not define the term "Hawaiian." Under the common meaning of the word, Petitioner certainly would qualify as "Hawaiian" since he was born in Hawaii and lived there all of his life.

But, since H.R.S., Chapter 13 deals with the election of trustees of OHA, and since H.R.S., Chapter 10 also deals with the Office of Hawaiian Affairs, the definition of "Hawaiian" in H.R.S., § 10-2 has been applied to exclude Petitioner from registering to vote for OHA trustees. All of the parties agree that the definition of "Hawaiian" in § 10-2 applies to § 13D-3(b)(1). Thus, Petitioner has been denied the right to vote, because, although his ancestors have lived in Hawaii for many years they did not arrive prior to 1778.

The Court of Appeals held that this discrimination does not run afoul of the Fourteenth and Fifteenth Amendments to the United States Constitution because voting is restricted to the beneficiaries of the trust.

However, while OHA trustees are elected by "Hawaiians" without regard to the 50% blood quantum, they have been entrusted with the management and disposition of a large portion of the income from the § 5(f) trust with the mandate that it be used for the betterment of the condition of "native Hawaiians". H.R.S., §§ 10-5(1), 10-13.5, 10-2; Haw. Const., Art. XII, §§ 4, 5 and 6.

Further, "native Hawaiians" comprise only approximately 10 percent of the total number of "Hawaiians", while the income from the § 5(f) trust is the primary source of funding for OHA. Thus, the constitutional and statutory scheme establishing OHA has created a conflict of interest on the part of the OHA trustees which is, in itself, a breach of the

§ 5(f) trust. Ninety percent of the "Hawaiians" who elect OHA trustees are not beneficiaries of the § 5(f) trust, but would like to be. Therefore, from its inception, OHA's goal has been to change the definition of "native Hawaiian" in order to include all "Hawaiians."

"Hawaiians" argue that they have been discriminated against and that Congress has imposed an "arbitrary" 50% blood quantum and that they have just as much right to participate in the benefits of the § 5(f) trust as "native Hawaiians."

Suppose wolves were an endangered species and Congress had given the state of Virginia 1.4 million acres of land in trust to provide habitat and funding to preserve them. If Virginia installed the American Kennel Club as trustees of this land and they, in turn, proposed that the definition of wolf be changed to include all breeds of domestic dogs, it would be a clear breach of trust. OHA is doing the same thing. OHA wants a person who is one-half Filipino, one-quarter Japanese, one-eighth Caucasian, one-sixteenth Chinese and one-sixteenth Hawaiian to be given the same benefits as a person who is one-half Hawaiian. How can such a person make a claim to participate as an equal beneficiary with a person who is one-half Hawaiian?

The classification in H.H.C.A. is not discriminatory because, as noted above, it is one of degree of kinship to the former owners of the land who were unjustly and wrongly deprived of their one-third undivided interest. Statutes of intestate inheritance in every state provide for the distribution of property based upon a person's degree of kinship to the decedent. This is not a discriminatory classification.

Rather, many "native Hawaiians", including *Amici*, consider OHA's efforts to change the beneficiaries to be a breach of the § 5(f) trust. While OHA has been pursuing this

course, it has not been using the trust income for the betterment of the condition of the beneficiaries. Instead, OHA has wrongfully accumulated over $300 million in income from trust § 5(f) waiting for the day that they can change the definition of "native Hawaiian" to include all "Hawaiians". At this very moment OHA is negotiating with the State for hundreds of millions of additional dollars of § 5(f) income and land. When *Amici* suggested that some of this money be used to provide compensation for the elderly native Hawaiian beneficiaries who have been denied homesteads for 40 years or more, OHA would not even consider it.

Meanwhile, native Hawaiian beneficiaries are being denied homesteads because of an alleged lack of funding to provide infrastructure for the development of homesteads. Numerous reports have been published documenting the State's continued breach of trust by failing to develop the available lands and distribute homesteads. *Final Report on the Public Land Trust,* Legislative Auditor of the State of Hawaii, Rep. No. 86-17, December, 1986; *A Broken Trust, The Hawaiian Homelands Program: Seventy Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians,* Hawaii Advisory Committee to the U.S. Commission on Civil rights, December 1991; *Progress Report on the Implementation of Recommendations of the Federal-State Task Force,* Office of the Governor of the State of Hawaii, January, 1992; *Hawaiian Homes Commission,* U.S. Dept. of the Interior, Office of Inspector General, Audit Report, Rep. No. 92-I-641, March, 1992; *Management and Financial Audit of the Department of Hawaiian Home Lands,* Auditor of the State of Hawaii, Rep. No. 93-22, December, 1993. Indeed, the State's continued breach of trust was the subject of a major front page newspaper article in the *Wall Street Journal*. Faludi, Susan C., "Broken Promise: How Everyone

Got Hawaiians' Homelands Except Hawaiians", *Wall Street Journal,* September 9, 1991, p. 1.

In theory, it should make no difference how OHA trustees are selected, whether by appointment or election. If elected, it should not make any difference who is entitled to vote. No matter how the trustees obtained their office they are theoretically bound by the fiduciary duty of absolute loyalty to the "native Hawaiian" special beneficiaries of the § 5(f) trust.

However, this duty has meaning only so far as beneficiaries are able and courts are willing to enforce it. Unfortunately, the Court of Appeals has not so far seen fit to take any action to enforce the § 5(f) trust, while the native Hawaiian beneficiaries continue to suffer.

IV. CONCLUSION.

Based on the foregoing argument and authorities, THE HOU HAWAIIANS and Chief MAUI LOA respectfully suggest that any constitutional or statutory provision allowing for the election of trustees of income from the § 5(f) trust intended to be used for the betterment of the condition of native Hawaiians must limit the qualifications for voters to native Hawaiian beneficiaries themselves, as defined in H.H.C.A. and § 5(f) of the Hawaii Admissions Act.

Dated: Honolulu, Hawaii, May 27, 1999.

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I. INTEREST OF AMICI[1]

Congress created the *HAWAIIAN HOMES COMMISSION* in 1921 to hold in trust and manage over 203,000 acres of lands for the benefit of descendants of aboriginal Hawaiians under the terms of the Hawaiian Homes Commission Act ("HHCA").[2] The *STATE COUNCIL OF HAWAIIAN HOMESTEAD ASSOCIATIONS* ("SCHHA") is an umbrella organization that represents 22 Hawaiian Homestead Associations which, in turn, represent beneficiaries who hold over 6,800 leases. *HUI KĀKO'O 'ĀINA HO'OPULAPULA*[3] ("HUI") represents Native Hawaiians who are waiting to receive HHCA leases. There are over 30,000 pending applications and many beneficiaries have been on the waiting list for decades. *KALAMA'ULA HOMESTEAD ASSOCIATION* ("KALAMA'ULA"), the first and oldest Homestead Association, was founded in 1922 on the island of Moloka'i. In 1926, the Kalama'ula Homesteaders successfully demonstrated their ability to farm the marginal lands awarded to them, thereby winning Congressional approval to continue the homesteading program.

The members of SCHHA, HUI and KALAMA'ULA are intended beneficiaries of the trust created by § 5(f) of the Hawai'i Admission Act. They have a direct and substantial

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* S.Ct. R. 37.3(a). Pursuant to Rule 37.6, the amici state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than the amici and their counsel made any monetary contribution to the preparation or submission of this brief.

[2] Act of July 9, 1921, 42 Stat. 108 (1921). There are 29 homestead communities on 6 islands throughout the State (O'ahu, 7; East Hawai'i, 6; West Hawai'i, 4; Maui, 4; Moloka'i, 4; Kaua'i, 3; Lāna'i, 1). Of 6,809 homestead leases, 1,043 are agricultural leases; 298 are pasture leases; and 119 are commercial general leases. The rest are residential leases.

[3] *Hui Kāko'o 'Āina Ho'opulapula* may be translated as "guardians of the homestead lands." Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary*, 86, 120 & 352-53 (1986 ed.).

legal interest in this matter. Reversal of the decision below could repudiate both the 1921 HHCA and terms of the 1959 Hawai'i Admission Act.

II. SUMMARY OF ARGUMENT

The native people of Hawai'i lost 99% of their lands and over 90% of their population in the 120 years between discovery (1778) and annexation by the United States (1898). The 1921 HHCA was Congress's first attempt to restore some of these lands to the native people. Crown and government lands previously ceded to the United States at annexation (including HHCA lands) were returend to Hawai'i in the 1959 Admissions Act, subject to special trusts for the benefit of Hawaiians. Responsibility for managing these federally created trusts was delegated to the State of Hawai'i, and made a specific condition to its admission to the Union. This federal delegation to the State of trust responsibility to the native people is unique. It is this trust responsibility that the State sought to carry out when it created the Office of Hawaiian Affairs.

In the land tenure system of pre-Western contact Hawai'i, the land was communally controlled by the chiefs and the commoners – this concept of land management most closely resembled a trust, with the chiefs as trustees and the common people as beneficiaries. Throughout the 19th century, Hawaiian leaders attempted to preserve this trust concept even as they were pressured to adopt increasingly Western-style property laws. In 1893, Queen Lili'uokalani was overthrown by an annexationist group dominated by Americans, and assisted by the United States Minister to Hawai'i and United States military forces.[4]

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[4] President Grover Cleveland, in a message to Congress dated December 18, 1893, said that "By an act of war, committed with the participation of a diplomatic representative of the United States and without authority of Congress, the Government of a feeble but friendly and confiding people has been overthrown. A substantial wrong has thus been done which a due regard for our national character as well as the rights of

Despite two centuries of struggle to perpetuate their culture and traditions, Hawaiians today remain a vibrant and culturally cohesive people, for whom the Office of Hawaiian Affairs and the *HAWAIIAN HOMES COMMISSION* now serve as trustees. These trusts comprise the bare remnants of land and political authority left to the first people of these Islands. In creating these trusts, Congress recognized a special relationship with Hawai'i's indigenous people.

The decision and judgment of the Ninth Circuit Court of Appeals should be affirmed.

III. ARGUMENT

A. Hawaiian Society, Culture, Traditions, And Land Tenure Thrived For More Than 1300 Years Before Western Contact In 1778.

Aboriginal Hawaiians are the native and indigenous people of the Hawaiian islands. Their culture and traditions are irrevocably intertwined with the life of those lands.[5] Hawaiians' relationship to the islands began with the Polynesian voyages of discovery from the Marquesas (100-400 A.D.) and later Tahiti.[6] The sophisticated culture, society, and

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the injured people requires we should endeavor to repair." *President's Message*, Executive Document No. 47, 53 Cong., 2d Sess., December 18, 1893 (lodged with the Court) [hereinafter *President's Message*].

[5] *See generally* Patrick V. Kirch, *Feathered Gods and Fishhooks* (1985) [hereinafter *Kirch*]; Patrick V. Kirch & Marshall Sahlins, *Anahulu: Vol. One – Historical Ethnography; Vol. Two – The Archeology of History* (1992) [hereinafter *Kirch and Sahlins*]; Ralph S. Kuykendall, *The Hawaiian Kingdom*, Vol. I, II & III (1938, 1953, & 1967) [hereinafter *Kuykendall*].

[6] Ben Finney, *Voyage of Rediscovery: A Cultural Odyssey through Polynesia* (1995). These origins demonstrate that "Hawaiians" are in fact not a "race" at all, but only the subgroup of Polynesians who occupied the Hawaiian islands, developed their own society, culture, traditions, and land tenure system from circa 100 A.D. to the present. *Kirch, supra* note 5, Chapter 4 and 58-60. The first Polynesian migration to the Hawaiian

traditions that they developed over the succeeding centuries were undisturbed by Western contact until 1778.[7]

The Hawaiian land tenure system was communal and subsistence-based, but subject to the territorial control of a class of chiefs.[8] The chiefs provided stewardship over the land, regulating the use of scarce resources, the maintenance of irrigation systems, and the conduct of rituals. Although sometimes mischaracterized as feudal, the land tenure system was unique to the islands. The commoners had no military duty. They were free to move if a chief was too oppressive. Chiefs who abused the people would lose their labor force or be replaced.[9] Reciprocal relationships wove a fabric of mutual obligations between the *ali'i* (chiefs) and the *maka'āinana* (commoners) that characterized Hawaiian society when westerners first arrived in 1778.[10]

Land use developed around geographic units (*ahupua'a*) running from the mountain to the ocean, with boundaries that followed mountain ridges, streams, or other natural features.[11] Under the management of the chiefs, commoners provided the labor to work the land, creating sophisticated irrigation systems for taro[12] cultivation and developing ocean-based aquaculture by constructing a system of shoreline fishponds. Essential goods were shared and

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islands between 100-400 A.D. was at least 400 years before Charlemagne's Holy Roman Empire, 600 years before the Norman Conquest of England, 1000 years before Columbus "discovered" the Americas, and 1300 years before the founding of our nation. *See Kirch, supra* note 5, at 285-308.

[7] *Kirch, supra* note 5, at 4-7, 67-68 & 284-308.

[8] *Id.* at 293-94.

[9] *Id.* at 4-5 & 7.

[10] *Kuykendall, supra* note 5, vol. I, at 10-11; *Kirch, supra* note 5, at 284-308; E.S. Craighill Handy and Mary Kawena Pukui, *The Polynesian Family System in Ka'u* (1952) [hereinafter *Handy and Pukui*].

[11] *In re Boundaries of Pulehunui*, 4 Haw. 239 (1879).

[12] Taro or *kalo* is a kind of aroid cultivated as a staple food by Hawaiians since earliest times. Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary* 123 (1986 ed.); E.S. Craighill Handy and E.G. Handy, *Native Planters in Old Hawaii* 92-110 (1972) [hereinafter *Handy and Handy*].

traded among fishermen, mountain dwellers and cultivators in an extended family network known as the *'ohana*.[13] In this culture, land was not a commodity to be owned or traded. Instead, it existed as an older sibling with whom reciprocal obligations were to be shared.[14]

B. Western Influences Had Devastating Effects On The Hawaiian Nation.

Captain James Cook's 1778 "encounter" with Hawai'i and with Hawaiians produced social consequences no less profound than Christopher Colombus's trans-Atlantic crossing did for the native peoples of North America. The unexpected arrival of the Western sailors, merchants, and missionaries with world views and practices unknown to the isolated Polynesian islands was traumatic. As with the "Indians" of North America, death rates for Hawaiians rose precipitously after contact due to their vulnerability to common European diseases and other maladies of "civilization."[15]

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[13] Davianna Pomaika'i McGregor, *An Introduction to* Hoa'aina *and Their Rights*, 30 Hawaiian Journal of History 1, 5 (1996) [hereinafter *McGregor*].

[14] Lilikalā Kame'elehiwa, *Native Land and Foreign Desires: Pehea Lā E Pono Ai?* 23-33 (1992) [hereinafter *Kame'elehiwa*]. Hawaiian legend traces the ancestry of Hawai'i's islands and people to the sky god, Wākea, and the earth goddess, Papa. Their first-born child, Hāloa naka, was stillborn and his small body, when buried, became the first taro root. Their second child Hāloa, named for the first, was the first Hawaiian. 6 A. Fornander, *Collection of Hawaiian Antiquities and Folklore* 360 (1920); David Malo, *Hawaiian Antiquities* 244 (1951).

[15] The Hawaiian population declined 50% in the first 27 years of western contact (from 300,000 to 152,000 between 1778-1805) and 72% within 72 years of contact (from approximately 300,000 in 1778 to less than 84,000 in 1850). R.S. Schmitt, *The Missionary Census of Hawaii*, Pacific Anthropology Record No. 20, at 41 (1973), *cited in 1 Native Hawaiians Study Commission Report On The Culture, Needs and Concerns of Native Hawaiians Pursuant to Pub. L. No. 96-565, Title III* 87, 471 (Dept. Of Interior June 23, 1983) [hereinafter *Native Hawaiians Study Commission Report*]. *See also Andrew W. Lind, Hawaii's People* 17 (1955);

Under pressure from the Western newcomers, rapid social changes took place, including: the political unification of the islands under Kamehameha I (1790-1810), the introduction of whaling (1820's) and the sandlewood trade (1810), the lifting of religious taboos (1819), the arrival of Christian missionaries (1820), suppression of traditional cultural activities (1820), adoption of Western legal principles (1839-40),[16] and transition to a modified system of private property (1848).

The concept of private ownership of land had no place in Hawaiian thought or history prior to the mid-Nineteenth Century. For the previous 1700 years, Hawaiians had a relationship to the land based upon actual use, care for the land (*aloha 'āina*), and reciprocal rights and obligations with the hierarchy of *ali'i* or chiefs who could not dispossess Hawaiian commoners without cause. This concept of communal land tenure was made a part of Hawai'i's first constitution in 1840, which said that the people had an interest in the kingdom in common with that of the chiefs and the King.[17]

This communal land tenure system, under pressure from American business interests, ended during the reign of Kamehameha III.[18] In its *Principles Adopted By The Board of*

R. Kekuni Blaisdell, M.D., *Health Section*, in *1 Native Hawaiians Study Commission Report* 99-115.

[16] "The Hawaiian chiefs who adopted the Anglo-American legal system faced the periodic reappearance of European gunboats threatening to flatten harbor towns. This pressure fueled their willingness to accept European notions of the superiority of civilization and the rule of law." Sally Engle Merry, *Law, Culture, and Cultural Appropriation*, 10 Yale J.L. & Humanities 575, 602 (1998) (describing "resistant appropriation" as a way to protect the Hawaiian nation from further political conquest).

[17] 1840 Constitution, *reprinted in* Hawaiian Laws 1841-1842 10 (1994) ("[The land] was not [Kamehameha I's] own private property. It belonged to the chiefs and people in common, of whom Kamehameha I was the head, and had the management of the landed property.").

[18] Gavan Daws, *Shoal of Time*, 124-28 (1968). *See also* Commission to Quiet Land Titles; Awards, Patents, Etc., Laws of Hawaii 109 (1846), *reprinted in* 2 Revised Laws of Hawaii 2120-24 (1925); Principles

Commissioners to Quiet Land Titles in Their Adjudication of Claims Presented to Them, the Land Commission declared that "there are but three classes of persons having vested rights in the land, 1st, the government (the king), 2nd, the landlord (the chief and the *konohiki*), and 3rd, the tenant."[19] In 1848, Kamehameha III and his chiefs approved a plan known as the *Māhele*[20] – which effectively ended Hawai'i's ancient communal land tenure system, and gave Westerners a way to acquire fee simple ownership of Hawaiian lands.[21] The commoners were permitted to file claims to obtain fee-simple title to the land where their houselots and subsistence taro patches were located.[22] Few did so.[23] Of more than 1.3

Adopted By The Board of Commissioners To Quiet Land Titles In Their Adjudication Of Claims Presented To Them, Laws of Hawaii 81 (1847), *reprinted in* 2 Revised Laws of Hawai'i 2130 (1925).

[19] Principles Adopted By The Board Of Commissioners To Quiet Land Titles In Their Adjudication Of Claims Presented To Them, Laws of Hawaii 81 (1847), *reprinted in* 2 Revised Laws of Hawai'i 2126 (1925).

[20] Jon J. Chinen, *The Great Mahele, Hawai'i's Land Division Of 1848* 20 (1958) [hereinafter *Chinen*]. *See also* Commission to Quiet Land Titles, Laws of Hawaii 107 (1847) & Principles Adopted by Land Commission, Laws of Hawaii 81 (1847), *reprinted in* 2 Revised Laws of Hawaii 2120-2142 (1925). "*Māhele*" means portion, division, section, or sharing. Mary Kawena Pukui and Samuel H. Elbert, *Hawaiian Dictionary* 219 (1986 ed.).

[21] Commoner's rights arising out of custom and usage still survive. *See* Haw. Rev. Stat. § 1-1 (1993) (custom as of 1892 codified as common law); *Id.* at § 7-1 (native tenants' rights preserved); Haw. Const. art. XII, § 7 (1978). *Public Access Shoreline Hawaii v. Hawai'i County Planning Commission*, 903 P.2d 1246 (Haw. 1995), *cert. denied*, 517 U.S. 1163 (1996) (discussing the survival of traditional and customary gathering rights by Hawaiians).

[22] Laws of Hawaii 202 (1850), *reprinted in* 2 Revised Laws of Hawaii 2141-42 (1925).

[23] Of approximately 28,000 adult male Hawaiians then living, only about 7,500 lots – totaling 0.6% of the 4.1 million acres of land in Hawai'i – were awarded to the commoners. Melody Kapilialoha MacKenzie, *Native Hawaiian Rights Handbook* 8 n. 46 (1991) [hereinafter *MacKenzie*]; J.

million acres given by the King to the "people" through the *Māhele*, less than 29,000 acres were awarded to native Hawaiian tenants,[24] who had little understanding of the consequences of the *Māhele*.[25]

Over the next three decades, the monarchy faced increasing pressure from the Hawaiian people to address the loss of their land and political control over their nation. By 1893, Queen Lili'uokalani had decided to promulgate a new constitution that would restore native Hawaiian voting power.[26] The Queen's attempt to change the Constitution precipitated her overthrow and the subsequent annexation by the United States. The loss of their Queen and their land prompted an outpouring of grief and protest among Hawaiians throughout the kingdom,[27] but their resistance was to no avail.

Hobbs, *Hawaii – A Pageant Of The Soil* (1935); Neil Levy, *Native Hawaiian Land Rights*, 63 Cal. L. Rev. 848, 853-57 (1975).

[24] *Chinen, supra* note 20 at 31.

[25] *Hawaiian Homes Commission Act, 1920: Hearings before the Committee on Territories of the United States Senate on H.R. 13500; A Bill to Amend An Act Entitled "An Act To Provide A Government For The Territory of Hawaii," Approved April 30, 1900, As Amended, To Establish An Hawaiian Homes Commission, And For Other Purposes*, 66th Congress, 3rd Sess. 68-69 (1921) (statement of Prince Jonah Kuhio Kalanianaole) [hereinafter *1921 Senate Hearings*] ("All they knew of the value of the lands was in the cultivation of same for their food. . . . [Y]ou can readily understand why the Hawaiians did not take advantage of that which the law recognized as theirs.").

[26] *Kuykendall, supra* note 5, vol. III at 582. The draft Constitution prepared by the Queen in 1893 would have returned property qualifications for voting to the lower level established in the Constitution of 1864. *Id.* at 582, 586. *See also* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, and to Offer Apology to Native Hawaiians on Behalf of the United States for the Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510 (1993) [hereinafter Public Law 103-150].

[27] After the overthrow, the Queen's Royal Hawaiian Band was ordered by the new government to sign a loyalty oath. Bandmembers were "threatened with dismissal, and told that they would soon be eating rocks

In 1898, the United States annexed Hawai'i by Joint Resolution, and 1.8 million acres of government and crown lands were ceded by Hawai'i, without compensation, to the United States. There was never any plebiscite of the Hawaiian people on the question of annexation, and contemporary observers were convinced that if there had been a popular vote, it would have been overwhelmingly against annexation.[28] Nonetheless, the United States acquired Hawai'i and in 1900 made it a Territory.[29] For the Queen, who had not militarily resisted her overthrow in hopes that the United States government would nullify the actions of its agents,[30]

(since they would have no money to buy food)." Noenoe K. Silva, *Kanaka Maoli Resistance to Annexation*, 1 'Ōiwi: A Native Hawaiian Journal 51 (1998) [hereinafter *Silva*]. The Band members refused to sign the oath, and told their story to a local songwriter who then composed a famous protest song entitled *Kaulana Nā Pua* (Famous are the Children), also known as *Mele 'Ai Pōhaku* (the Stone-Eating Song). *Id.* The lyrics repeated the Band members' resolve that they would rather eat stones than give up their land. *Ua lawa mākou i ka pōhaku, I ka 'ai kamaha'o o ka 'āina.* The song's sweet melody belies the bitterness of its lyrics. *Id.*; Albert J. Schütz, The *Voices of Eden* 353-54 (1994) [hereinafter *Schütz*]. This song is still sung today, in remembrance of the love that Hawaiians have for their land.

[28] 42 U.S.C. § 11701(11) (1995); J. Res. 55, 55th Cong., 2d. Sess., 30 Stat. 750 (1898); 2 *Native Hawaiians Study Commission Report* 168 n. 9; T. Coffman, *Nation Within* 272-287 (1998) (More than 21,000 people signed petitions opposing annexation. At the time, there were only 40,000 Hawaiians). *See also* Three editorials by Edward L. Like & E.A. Nawahi, eds., [*Ke Aloha Aina*], *translated in*, 1 'Ōiwi: A Native Hawaiian Journal 81-93, 94-100, 101-03 (1998) (originally published in 1897, these editorials poignantly recount efforts to gather signatures for petitions opposing annexation).

[29] Hawaii Organic Act, ch. 339, 31 Stat. 141 (1900) [hereinafter *Organic Act*].

[30] "She knew that she could not withstand the power of the United States, but she believed that she might safely trust to its justice." *President Message, supra* note 4.

annexation "***extinguish[ed] the nationality of my poor people***."[31]

C. Congress Recognized The Historical Plight Of The Descendants Of Aboriginal Hawaiians In The Hawaiian Homes Commission Act Of 1921.

Two decades later, Congress responded to the problems of the Hawaiian people by adopting the Hawaiian Homes Commission Act, 1921 ("HHCA").[32] The purposes of the HHCA were twofold: (1) to "rehabilitate" the dying Hawaiian people by returning them to the land,[33] and (2) to redress an historically inequitable distribution of land that left the overwhelming majority of the Hawaiian population without title to the very land on which they lived.[34]

1. Congress Sought To Stop The Rapid Decline Of The Hawaiian Population.

In 1920-21, the continued existence of the Hawaiian culture and society was in jeopardy. The House Committee on the Territories reported that: "[T]he number of full-blooded Hawaiians in the Territory has decreased since the estimate of

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[31] Lydia Kamaka'eha Lili'uokalani, *Hawaii's Story by Hawaii's Queen* 309-10 (1990) (emphasis added).

[32] Hawaiian Homes Commission Act, 42 Stat. 108 (1921). *See generally*, Lesley Karen Friedman, *Native Hawaiians, Self-Determination and the Inadequacy of State Land Trusts*, 14 Univ. Haw. L. Rev. 519, 536-539 (1992) (a summary of background of the HHCA); Daws, *supra* note 18, at 296-99 (political analysis).

[33] H.R. Rep. No. 839, 66th Cong., 2d Sess. 4 (1920) (statement of John Wise, Senator of the Territorial Legislature).

[34] *Id.* at 2-7. *See also* James Blount, Letter to W.Q. Gresham, U.S. Secretary of State, dated July 17, 1893, Report of the Commissioner to the Hawaiian Islands (Government Printing Office, 1893) ("The landless condition of the native population grows out of the original distribution and not from shiftlessness. To them homesteads should be offered rather than to strangers.")

1826 from 142,650 to 22,500,"[35] and there would be none left in a few years.[36]

Senator John H. Wise, a member of the Legislative Commission of the Territory (of Hawai'i) and one of the authors of the HHCA, testified before the United States House of Representatives:

> The idea in trying to get the lands back to some of the Hawaiians is to rehabilitate them. I believe that we should get them on lands and let them own their own homes. . . . The Hawaiian people are a farming people and fishermen, out of door people, and when they were frozen out of their lands and driven into the cities they had to live in the cheapest places, tenements. That is one of the reasons why the Hawaiian people are dying. Now, the only way to save them, I contend, is to take them back to the lands and give them the mode of living that their ancestors were accustomed to and in that way rehabilitate them.[37]

Prince Jonah Kuhio Kalanianaole ("Prince Kuhio"), the Territory's sole delegate to Congress, testified before the full U.S. House of Representatives: "The Hawaiian race is passing. And if conditions continue to exist as they do to-day, this splendid race of people, my people, will pass from the face of the earth."[38] Secretary of Interior Lane attributed the declining population to health problems like those faced by the "Indian in the United States" and concluded the Nation must provide similar remedies.[39]

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[35] *Id.* at 2.

[36] H.R. Rep. No. 209, 67th Cong., 1st Sess. 1-2 (1921).

[37] *Id.* at 3-4. Wise's testimony was quoted and adopted in the House Committee on the Territories' report to the full U.S. House of Representatives.

[38] 59 Cong. Rec. 7453 (1920) (statement of Prince Jonah Kuhio Kalanianaole).

[39] H.R. Rep. No. 839, 66th Cong., 2d Sess. 5 (statement of Secretary of Interior Lane).

2. Congress Sought To Redress An Historically Inequitable Distribution Of Land That Left Three Quarters Of The Hawaiian Population Homeless.

In support of the HHCA, the House Committee on the Territories recognized that, prior to the *Māhele*, Hawaiians had a one-third interest in the land. The Committee reported that the HHCA was necessary to address the way Hawaiians had been short-changed in prior land distribution schemes:

> The second great factor demanding passage of this bill lies in the ineffectiveness of all previous systems of land distribution. . . . **[H]aving been recognized as owners of a third interest in the lands of the kingdom, the common people, believing that in the future means were to be adopted to place them in full possession of these lands, assumed that the residue was being held in trust by the Crown for their benefit.** However, the lands were never conveyed to the common people and, after a successful revolution, were arbitrarily seized, and by an article in the Hawaiian constitution became the public lands of the Republic of Hawaii.[40]

Prince Kuhio further testified before the U.S. House of Representatives that Hawaiians had an equitable interest in the unregistered lands that reverted to the Crown before being taken by the Provisional Government and, subsequently, the Territorial Government:

> [T]hese lands, which we are now asking to be set aside for the rehabilitation of the Hawaiian race, **in which a one-third interest of the common people had been recognized, but ignored in the division,**

[40] H.R. Rep. No. 839, 66th Cong., 2d Sess. 5 (1920) (emphasis added). *See also* Prince J.K. Kalanianaole, *The Story of the Hawaiians*, The Mid-Pacific Magazine, Vol. XXI, No. 2, February 1921, at 126, col. 2 (lodged with the Court).

> **and which had reverted to the Crown, presumably in trust for the people, were taken over by the Republic of Hawaii. . . . By annexation these lands became a part of the public lands of the United States, and by the provisions of the organic act are under the custody and control of the Territory of Hawaii.** . . . We are not asking that what you are to do be in the nature of a largesse or as a grant, but as a matter of justice – belated justice. . . .[41]

Thus, in 1921, Congress recognized the existence of a special relationship between the United States and Hawaiians and the equitable interest the Hawaiian people held in public lands.

The Hawaiian Home Lands conveyed to the State of Hawai'i were limited to over 203,000 acres of marginally useful lands and the beneficiaries were limited by a 50% blood requirement.[42] The pressing needs for a program that could address the needs of other Hawaiians were ignored. Likewise, needs beyond lands for homesteading (*e.g.*, health care and education) were not addressed.

[41] 59 Cong. Rec. 7452-7453 (1920) (statement of Prince Jonah Kuhio Kalanianaole) (emphasis added). *See also Proposed Amendments To The Organic Act of the Territory of Hawaii: Hearings before the Committee on the Territories for the House of Representatives*, 66th Cong., 2d Sess. 170 (1920) [hereinafter *1920 House Hearings*] ("[T]he Hawaiians were deprived of their lands without any say on their part, either under the kingdom, under the republic, or under the United States Government.") (statement of Rep. Charles F. Curry, Chairman); *1920 House Hearings* at 88 ("[T]hese crown lands never really vested in the Federal Government except in trust for the common people. . . . That they were placed in trust for the common people when in possession of the king, *and just as we have provided land for the Indians*, we may use these lands to provide for the Hawaiian lands.") (statement of Rep. Charles F. Curry, Chairman) (emphasis added).

[42] In 1986, Congress authorized Hawaiians with at least 25% native blood to succeed to the leases of their parents and spouses. Joint Resolution to Consent to an Amendment Enacted by the Legislature of the State of Hawaii to the Hawaiian Homes Commission Act, [1921], Pub. L. No. 99-557, 100 Stat. 3143 (1986).

D. Congress Conditioned Hawai'i's Admission As A State Into The Union Upon The Assumption Of Trust Duties Over HHCA And Other Returned Public Lands In Recognition Of The United States' Special Relationship To The Indigenous Hawaiian People.

In the Joint Resolution (1898) annexing Hawai'i, Congress expressly imposed a trust on Hawai'i's public government and Crown lands.[43] In 1900, Congress confirmed this trust in the Organic Act, ch. 339, 31 Stat. 141, §§ 73(e) and 91 (1900). With the passage of the HHCA, Congress sought in part to fulfill these trust duties for the Hawaiian people.

In the 1959 Hawai'i Admission Act, § 4, Congress required that the State of Hawai'i adopt the HHCA as part of its constitution and assume management over Hawaiian home lands:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, as amended, shall be adopted as a provision of the Constitution of said State, . . . subject to amendment or repeal only with the consent of the United States, and in no other manner.[44]

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[43] 22 U. S. Op. Att'y Gen. 627, 630 (1899) ("The effect of this clause [in the annexation resolution] is to subject the public lands in Hawai'i to a special trust. . . . "). The Petitioner's cursory statement that "public lands" transferred from the Provisional Government to the United States upon annexation were "free and clear of any encumbrances or obligations," and his reference to then Hawai'i Attorney General Harry Irwin's statement in the 1921 hearings before the Senate Committee on the Territories, Petitioner's Brief, at 2-3 & 4 n.1, are not accurate. The House Committee reporting to the full House rejected Irwin's views and found that the "second great factor demanding passage of this bill" was the inequitable land distribution system in the *Māhele*. H.R. No. 839, 66th Cong., 2d Sess. 5 (1920).

[44] Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4, § 4 (1959). The provision was incorporated in Hawai'i's Constitution, now codified in Article XII, § 3. The people of Hawai'i adopted the provision pursuant to the plebiscite required by § 7 of the Admission Act.

Congress further required in § 5 of the Admission Act that the public government and crown lands which were ceded to the United States by the Republic of Hawaii in 1898, and not retained by the United States, must be conveyed to the State and held:

> [t]ogether with the proceeds from the sale or other disposition of any such lands and the income therefrom, . . . as a public trust . . . for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended. . . . Such lands, proceeds and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said state may provide, and their use for any other object shall constitute a breach of trust for which suit may be brought by the United States. . . . [45]

Congress, through the 1959 Admission Act, § 1, accepted, ratified and confirmed the 1950 Constitution adopted by the people of Hawai'i in the election of 1950[46] and further required that the State meet the conditions in § 4 (incorporating the HHCA) and § 5 (public trust on returned ceded lands). By accepting the state constitution and enacting § 4 and § 5(f), Congress delegated broad authority to the State to carry out the obligations that the United States itself had accepted upon acquiring the Hawaiian islands. The State consented to this delegation as a condition of statehood.

The Attorney General of the United States opined that the ceded lands of Hawai'i were a "special trust," the "naked title being held by the Federal Government for the benefit of the

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[45] *Id.* at § 5(f).

[46] Included in the 1950 Constitution was a provision that stated "[a]ny trust provisions which the Congress shall impose, upon the admission of this State, in respect of the lands patented to the State by the United States or the proceeds and income therefrom, shall be complied with by appropriate legislation." Haw. Const. art. XVI, sec. 7, s. 1 (1978) (formerly art. XIV, sec. 7 (1950)).

people of Hawaii."[47] In 1964, Congress passed the Revised Conveyances Procedures Act[48] and reaffirmed the special trust status of those lands held by the United States.

> The bulk of the lands involved, which were ceded at the time of annexation, have always been treated differently than the other public lands of the United States. **History clearly indicates that those lands were regarded as having been held in a special trust status by the United States for the benefit of the Hawaiian people.**[49]

The HHCA and the Admission Act § 5(f) trusts are *both* federal law *and* State law.[50] They are integral to the Compact

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[47] 42 Op. Att'y Gen. 43, 46-47 (June 12, 1961).

[48] Pub. L. No. 88-233, 77 Stat. 472, 88th Cong., 1st Sess., *reprinted in* U.S.C.C.A.N. 1362-1366 (1963).

[49] Letter from Kermit Gordon, Director, Bureau of the Budget, to Lyndon Johnson, October 28, 1963, S. Rep. No. 675, on Pub. L. No. 88-233, 88th Cong., 1st Sess., *reprinted in* U.S.C.C.A.N. 1362-1366 (1963).

> If [Pub L. No. 88-233] is not enacted, the [public government and Crown] lands, which the Federal Government received by voluntary cession and donation of the people of Hawaii and for which it paid no compensation, would become subject to disposal under the Federal property laws [in 40 U.S.C. § 471 et seq.] after August 21, 1964 when they become surplus. Under the terms of the Statehood Act, Hawaii would thus lose its long recognized residual interest in such lands and the 60 year practice of returning such lands to Hawaii when they are no longer needed would be terminated. Such a result would be in effect a reverse land grant that would be highly inequitable in view of the history of the subject lands and the spirit and intent of the Statehood Act.

[50] Although the HHCA is not codified in the United States Code, it was never repealed. By its own terms, the HHCA may only be amended with the consent of Congress. During the territorial period, Congress amended the HHCA 22 times. *Federal-State Task Force on the Hawaiian Homes Commission Act: Report to the United States Secretary of Interior and the Governor of the State of Hawaii* 213-228 (August 15, 1983). From

by which Hawai'i became a State in the Union. They were both expressly ratified by Congress and the people of Hawai'i at Statehood in Section 7 of the Admissions Act. They reaffirm the "special relationship" between the United States and the indigenous Hawaiian people that has been political in its nature from inception.[51] Whether measured by the "guardian-ward" concept applied by Congress to Indians,[52] by the obligation of an acquiring nation to a people whose lands had been taken without just cause,[53] by the "domestic dependent nation" concept articulated by this Court[54] or a fiduciary

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1986-90, Hawai'i's Legislature submitted 15 amendments to the U.S. Congress for ratification. Congress consented to 10, withheld consent to 4, and 1 was deemed not to require submission. Pub. L. 102-288, 106 Stat. 1953 (1992); Pub. L. 105-21, 111 Stat. 235 (1997). This ongoing oversight reflects the continuing federal interest in State legislation relating to native Hawaiians and the continuing vitality of the delegation of authority in the Admissions Act.

[51] *Morton v. Mancari*, 417 U.S. 535, 553-555 (1974); *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977); *United States v. Johns*, 437 U.S. 634 (1978).

[52] "Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all the dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a State . . . It is for that body [Congress] and not for the courts to determine when the true interests of the Indian require his release from such condition of tutelage." *United States v. Candelaria*, 271 U.S. 432 (1926) citing *United States v. Sandoval*, 231 U.S. 28, 45-47 (1913)).

[53] *Felix S. Cohen's Handbook of Federal Indian Law* 50-58 (2d ed. 1982).

[54] *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831) (tribes are described as "domestic dependent nations . . . in a state of pupilage. Their relation to the United States resembles that of a ward to his guardian."); *see also United States v. Kagama*, 118 U.S. 385 (1886).

standard,[55] the United States undertook special responsibilities to the indigenous people of Hawaii when the United States acquired both Hawai'i and its public government and crown lands. Congress has never extinguished these rights or its special relationship with indigenous Hawaiian people. To deny such a relationship would require repudiating not just the HHCA but also the foundations of Hawai'i's Admission Act and more than seven decades of Congressional solicitude for the needs of Hawaiians.

E. OHA And Its Voting Requirements Are Part Of The Panoply Of Political Measures That Federal And State Sovereigns Designed To Address The Harms Attendant To The Loss Of Hawaiian Nationhood.

The years following statehood brought massive development to the islands, and motivated Hawaiians to protect rural communities where traditional and customary Hawaiian practices still survived.[56] Greater public understanding of Hawaiian issues eventually resulted in the adoption of a number of governmental programs.[57]

In 1978, the people of Hawai'i determined that proper fulfillment of § 5 trust obligations required them to provide Hawaiians with a measure of control over their own destinies. In this context, OHA and its beneficiary-chosen leadership are properly seen as one part of a panoply of political acts by state and federal sovereigns that are designed to address,

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[55] *United States v. Mitchell*, 463 U.S. 206, 225-227 (1983); *Ahuna v. Department of Hawaiian Home Lands*, 64 Haw. 327, 640 P.2d 1161 (1982).

[56] Davianna McGregor-Alegado, *Hawaiians: Organizing In The 1970s*, 7 Amerasia Journal 29, 37 (1980).

[57] Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Policy Rev. 95, 106 and n.67 (1998) (listing legislation).

directly and indirectly, the loss of sovereignty and nationhood by the indigenous Hawaiian people:

> Hawai'i is the homeland of *ka po'e Hawai'i* [the Hawaiian people]. These islands have shaped and sustain a unique culture that struggles to survive the loss of sovereignty, alienation from the land, dominance of their cultures, and the concomitant decline of the general welfare of Hawaiians. The Office of Hawaiian Affairs was established in recognition and in response to the severe social, economic, cultural, and spiritual problems of Hawaiians. It is therefore the mission of OHA to: Strengthen and maintain the Hawaiian people and their culture as powerful and vital components in society.[58]

This concern for restoring a sense of sovereign autonomy to a dispossessed and disenfranchised people is central to the trust obligations that Congress has shared with the State of Hawai'i. In pursuing this mission, OHA – in tandem with the *HAWAIIAN HOMES COMMISSION* – is supporting Congress' goal of rehabilitating and sustaining the well-being of the indigenous people of Hawai'i.

Both the federal executive and legislative branches have acknowledged that "the health and well being of the Native Hawaiian people is intrinsically tied to their deep feelings and attachment to the land"[59] – attachments severed in part by the

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[58] Office of Hawaiian Affairs, *Native Hawaiian Data Book* iii (1998).

[59] Public Law 103-150. *See also* Native Hawaiian Health Research Consortium, Mental Health Task Force & Alu Like, Inc., *E Ola Mau: Native Hawaiian Health Needs Study, Mental Health Task Force Report*, viii (1985); *Administration of Native Hawaiian Home Lands: Joint Hearings Before The Select Committee On Indian Affairs United States Senate And The Committee On Interior And Insular Affairs House Of Representatives*, 101st Cong., 1st Sess. 37-38 (1989) (noting that Hawaiians' life expectancy, death rate, and disease rate were as much 126% to 588% higher than all other groups in the U.S.). As a result of sobering statistics like these, Congress passed the Native Hawaiian Health Care Improvement Act ("Health Care Act"), Pub. L. No. 100-579, 102 Stat. 2916 (1988) (now codified in 42 U.S.C. §§ 10101-12300 (1995)). Congress

loss of Hawaiian lands. As with other aboriginal people in the United States, the effects of losing control over ancestral land and resources can be seen in virtually every indicator of social or economic progress. "These statistics reflect the individual and collective pain, bitterness and trauma of a people . . . who are dispossessed in their own homeland; and who lack control of the resources of their ancestral lands to provide for the welfare of their people."[60]

The government's acknowledgment of the profound cultural destruction and spiritual suffering attendant to the loss of nationhood, passed from generation to generation, is an appropriate way to advance the political process of reconciliation with Native Hawaiians.[61] Congress has both acquiesed[62] in and ratified[63] Hawai'i's constitutional amendments and statutory laws creating OHA. OHA now provides Native Hawaiian beneficiaries with a direct voice in the management of their trust resources. This is entirely proper given the United States' delegation of authority to the state, Hawai'i's geographic isolation in the middle of the Pacific, and Hawaiians' unique political, cultural, and social history.

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authorized these special benefits in express recognition of "the historical and unique legal relationship" between Hawaiians and the United States government. 42 U.S.C. §§ 11701(19)-(21) (1995).

[60] Luciano Minerbi, Davianna McGregor & Jon Matsuoka, *Native Hawaiian and Local Cultural Assessment Project* 15 (1993).

[61] *See* Public Law 103-150, secs. 1(4) & (5) (expressing Congress' "commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the United States and the Native Hawaiian people" and urging the President to support reconciliation efforts). *Cf.* Eric K. Yamamoto, *Interracial Justice: Conflict & Reconciliation in Post-Civil Rights America*, 60-78, 210-35 (1999).

[62] *Cf. Arizona v. California*, 373 U.S. 546, 597-98 (1963) (presidential executive order reserving water on federal land upheld in light of congressional acquiesence); *U.S. v. Midwest Oil*, 236 U.S. 459, 469-75 (1915) (presidential proclamation withdrawing lands from petroleum exploration upheld in light of congressional acquiesence).

[63] *See supra* note 57.

F. Despite The Overthrow And Annexation Of The Hawaiian Nation, Hawaiian Culture Has Survived – The Hawaiian People Have A Unique Culture That Continues Today.

Despite all of the burdens imposed upon them over the past two centuries, Hawaiians continue to nurture and celebrate the unique traditions of their ancestors.[64]

Aloha 'Āina (Love of the Land) – Native Hawaiians honored their bond with the land (*aloha 'āina*) by instituting one of the most sophisticated environmental regulatory systems on earth, the *kapu* system. For Hawaiians, the life of the land depended on the righteousness of the people.[65] This concept motivated three decades of effort by Hawaiian leaders to regain Kaho'olawe, an island with deep spiritual significance. Once a military bombing practice target, Kaho'olawe is now listed in the National Historic Register, and is the subject of a massive federal clean-up project.[66]

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[64] *See generally* Jay Hartwell, *Na Mamo: Hawaiian People Today* (1996) (profiles of contemporary individuals who practice Hawaiians traditions and customs, including farming, music, *hula*, Hawaiian language, canoeing, surfing, *kapa* (bark cloth) making, *la'au lapa'au* (Hawaiian healing), *pono* (justice), and religion). Excerpts of the book are available at *http://www.lava.net/namamo*.

[65] The State's motto reflects this concept: "Ua mau ke ea o ka 'āina i ka pono." (The life of the land is perpetuated in righteousness.) Haw. Const. art. XV, § 5 (1978).

[66] *Kaho'olawe Island: Restoring a Cultural Treasure, Final Report of the Kaho'olawe Island Conveyance Commission to the Congress of the United States* 2 (March 31, 1993) ("This report calls upon the United States government to return to the people of Hawai'i an important part of their history and culture, the island of Kaho'olawe. The island is a special place, a sanctuary, with a unique history and culture contained in its land, surrounding waters, ancient burial places, fishing shrines, and religious monuments."). Title X of the Fiscal Year 1994 Department of Defense Appropriations Act, Pub. L. No. 103-139, 107 Stat. 1418 (1994) was enacted on November 11, 1993. Section 10001(a) of Title X states that the island of Kaho'olawe is among Hawai'i's historic lands and has a long, documented history of cultural and natural significance to the people of

Subsistence – Ancient Hawaiians supplemented the produce of their farms and fishponds by fishing, hunting and gathering plants. These subsistence activities became increasingly more difficult to pursue as changing land ownership patterns barred access to natural resources. Nonetheless, in predominantly Hawaiian rural areas such as Hana, Puna, and the island of Moloka'i, native Hawaiians continue to feed their families as their ancestors did before them.[67] Hawai'i law has always guaranteed subsistence gathering rights to the people so they may practice native customs and traditions.[68]

Kalo (Taro Cultivation) – In Hawaiian legend, the staple crop of *kalo* (taro) was revered as the older brother of the Hawaiian people.[69] Taro cultivation was not only a means of sustenance, but also a sacred duty of care to an older sibling.

Hawaii. It authorized $400,000,000 to be spent for the clean-up of military ordnance from portions of the island. *Id. See* Haw. Rev. Stat. Chap. 6K (1993). The state Kaho'olawe Island Reserve Commission holds the resources and waters of the island of Kaho'olawe in trust until such time as the State of Hawai'i and the federal government recognize a sovereign Hawaiian entity. *Id.* at § 6K-9.

[67] *See* Davianna McGregor, *et al., Contemporary Subsistence Fishing Practices Around Kaho'olawe: Study Conducted for the NOAA National Marine Sanctuaries Program* (May 1997). *See also* Jon K. Matsuoka, *et al., Governor's Moloka'i Subsistence Task Force Report* (1993); Andrew Lind, *An Island Community: Ecological Succession in Hawaii* 102-03 (1968 ed.). (observing, in 1938, that traditional and customary practices survived in rural "havens where the economy of life to which they are best adapted can survive."). Hawaiian homestead tracts provide such rural havens.

[68] Haw. Const. art. XII, § 7 (1978). Hawaiian usage supersedes other sources of common law in Hawai'i. Haw. Rev. Stat. § 1-1 (1993); *Branca v. Makuakane*, 13 Haw. 499, 505 (1901) ("The common law was not formally adopted until 1893 and then subject to precedents and Hawaiian national usage."). *See also* Haw. Rev. Stat. § 7-1 (1993); *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982).

[69] *See supra* note 14.

As land tenure changed, however, the ancient, stream-irrigated taro paddies (*lo'i*) were lost to newer crops, encroaching development, and the diversion of rivers and streams.[70] In recent years, Hawaiians reclaimed and restored ancient taro fields, and formed a statewide association of native planters, *'Onipa'a Na Hui Kalo*.

'Ohana (Extended Family) – In the earliest era of Hawaiian settlement, governance was a function of the family.[71] For Hawaiians, family included blood relatives, beloved friends (*hoaloha*) and informally adopted children (*hānai*).[72] Family genealogies were sacred, and passed down in the form of oral chants only to specially chosen children – when those children were barred from learning their language, many of these ancient genealogies were lost. Nevertheless, family traditions of respect for elders, mutual support for kin and the adoption of related children have continued over the past two centuries:

> The *'ohana* beliefs, customs, and practices predated the *ali'i*; coexisted under the rule of the *ali'i*; and have continued to be practiced, honored and transmitted to the present. The *'ohana* continued to honor their *'aumakua* (ancestral deities). Traditional *kahuna la'au lapa'au* (herbal healers) continued their healing practices using native Hawaiian

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[70] *See, e.g., Reppun v. Board of Water Supply*, 656 P.2d 57 (Haw. 1982) (in this case, taro growers prevailed against water diversions that would have adversely affected their crops), *cert. denied*, 471 U.S. 1014 (1985).

[71] *See generally Handy and Pukui, supra* note 10; 1 Mary Kawena Pukui, E.W. Haertig & Catherine A. Lee, *Nānā I Ke Kumu* 49-50 (6th prtg. 1983) (explaining Hawaiian concepts of adoption and fostering).

[72] *'Ohana* is a concept that has long been recognized by Hawai'i courts. *See, e.g., Leong v. Takasaki*, 520 P.2d 758, 766 (Haw. 1974); *Estate of Emanuel S. Cunha*, 414 P.2d 925, 928-29 (Haw. 1966); *Estate of Farrington*, 42 Haw. 640, 650-51 (1958); *O'Brien v. Walker*, 35 Haw. 104, 117-36 (1939), *aff'd*, 115 F.2d 956 (9th Cir. 1940), *cert. denied*, 312 U.S. 707 (1941); *Estate of Kamauoha*, 26 Haw. 439, 448 (1922); *In re Estate of Nakuapa*, 3 Haw. 342, 342-43 (1872).

> plants and spiritual healing arts. Family burial caves and lava tubes continued to be cared for. The hula and chants continued to be taught, in distinctly private ways, through *'ohana* lines.[73]

Today, there is an extensive and growing network of reclaimed family genealogies, one of which is formally maintained by OHA (Operation *'Ohana*). Huge Hawaiian family reunions are routinely held throughout the islands, in every week of the year. In honor of a cultural tradition that reveres the taro root as the older brother of the Hawaiian race, these modern activities are called "*ho'i hou i ka mole*," or "return to the tap-root."

'Iwi (Bones) – In Hawaiian culture, the bones of the deceased carried the *mana* (spiritual power) of the decedent. These bones were treated with great reverence, and fearful consequences were sure to befall any who desecrated them. The protection of the bones of their ancestors remains a solemn responsibility for modern day Hawaiians. The State of Hawai'i has recognized the importance of protecting Hawaiian burial sites, and established a Hawaiian Burial Council to ensure the *'iwi* of Hawaiian ancestors are treated with proper respect.[74]

Wahi Kapu (Sacred Places) – Ancient Hawaiians also recognized certain places as sacred, and took extraordinary measures to prevent their desecration. A modern day example of this concept is found at *Mauna 'Ala* on the island of 'Oahu, where the remains of Hawai'i's ali'i (monarchs) are interred. This royal mausoleum is cared for by a *kahu* (guardian), who is the lineal descendant of the family charged since antiquity with protecting the bones of this line of chiefs.

'Ōlelo Hawai'i (Hawaiian Language) – "*I ka 'olelo no ke ola; i ka 'olelo no ka make.* With language rests life, with

---

[73] McGregor, *supra* note 13, at 9.

[74] Haw. Rev. Stat. § 6E-43.5 (1993). This provision requires consultation with appropriate Hawaiian organizations, like *Hui Mālama I Nā Kūpuna O Hawai'i Nei. See* http://www.pixi.com/~huimalam.

language rests death."[75] The Hawaiian language was banned from the schools in 1896.[76]

> During the Republic and Territory, Hawaiian was strictly forbidden anywhere within schoolyards or buildings, and physical punishment for using it could be harsh. Teachers who were native speakers of Hawaiian (many were in the first three decades of the Territory) were threatened with dismissal for using Hawaiian in school. Some were even a bit leery of using *Hawaiian place names* in class. Teachers were sent to Hawaiian-speaking homes to reprimand parents for speaking Hawaiian to their children.[77]

The language was kept alive in rural Hawaiian families and in the *mele* and *oli* (songs and chants) of native

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[75] Ka'ū: University of Hawai'i Hawaiian Studies Task Force Report 23 (Dec. 1986). These anti-Hawaiian language efforts, which were falsely cast in terms of assimilation and societal unity. Nevertheless, the core issues of sovereignty and self-determination remained – for, "to destroy the language of a group is to destroy its culture." Adeno Addis, *Individualism, Communitarianism, and the Rights of Ethnic Minorities*, 66 Notre Dame L. Rev. 1219, 1270 (1991).

[76] 1 Revised Laws of Hawaii § 2, at 156 (1905). As a direct result of this law, the number of schools conducted in Hawaiian dropped from 150 in 1880 to zero in 1902. Albert J. Schütz, *The Voices of Eden: A History of Hawaiian Language Studies* 352 (1994) [hereinafter *Schütz*]. Hawaiian language newspapers, which were the primary medium for communication in Hawaiian at that time, declined from a total of twelve (nine secular and three religious) in 1910 to one religious newspaper in 1948. *Id.* at 362-63.

[77] Larry K. Kimura and William Wilson, 1 *Native Hawaiians Study Commission Minority Report*, 196 (U.S. Dept. of Interior 1983). *See also* Davianna McGregor-Alegado, *Hawaiians: Organizing in the 1970s*, 7 Amerasia Journal 29, 33 (1980) ("Through a systematic process of assimilation in the schools, especially restricting the use of the native language, Hawaiians were taught to be ashamed of their cultural heritage and feel inferior to the *haole* American elite in Hawaii.").

speakers.[78] In 1978, the Hawai'i State Constitution was finally amended to make Hawaiian one of the two official languages of the state.[79] In the two decades since, Hawaiian language has become a required offering in the state Department of Education curriculum, and private non-profit Hawaiian language schools have been established on all major islands, with the assistance of federal funds.[80] In 1997-1998, 1,351 students were enrolled in fourteen Hawaiian language immersion programs throughout the State, from pre-school through high school.[81] Hawaiian remains the first language of the native community located on the isolated island of Ni'ihau, which was spared the effects of the 1896 ban.[82]

Ho'oponopono (Conflict Resolution)[83] – This ancient Hawaiian tradition of problem solving resembles the Western

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[78] "[T]he renewal of interest in the Hawaiian language and culture in the 1970s did not relight an extinguished flame, but fanned and fed the embers[.]" *Schütz, supra* note 27, at 361.

[79] Haw. Const. art. XV, sec. 4 (1978). *See also* Haw. Const. art. X, sec. 4 (1978) (requiring the State to "promote the study of Hawaiian culture, history and language . . . [through] a Hawaiian education program . . . in the public schools."). Restrictions on the use of Hawaiian language in public schools were not actually lifted until 1986. *See* Haw. Rev. Stat. § 298-2(b) (1993).

[80] Native Hawaiian Education Act, Pub. L. No. 103-382, § 101, 108 Stat. 3518 (Oct. 20, 1994).

[81] Office of Hawaiian Affairs, *Native Hawaiian Data Book* 244-45 (1998) (Table/Figure 4.22). Projected enrollment for the 2005-2006 school year is 3,397. *Id.* Dramatic increases in the enrollment of Hawaiians at the University of Hawai'i took place shortly after adoption of the 1978 Constitutional Amendments and again after statutory restrictions were lifted in 1986 on use of the Hawaiian language in schools. *Id.* at 216-17 (Table/Figure 4.7). According to the 1990 Census, Hawaiian is spoken in 8,872 households. *Id.* at 240-41 (Table/Figure 4.20).

[82] Karen Silva, *Hawaiian Chant: Dynamic Cultural Link or Atrophied Relic?*, 98 Journal of the Polynesian Society 85, 86-87 (1989), *cited in* Schütz, *supra* note 27, at 357.

[83] *See generally* Victoria Shook, Ho'oponopono, *Contemporary Uses of a Hawaiian Problem-Solving Process* (1985).

practice of mediation, but with the addition of a deeply spiritual component. It was and is traditionally practiced within families, and used to resolve disputes, cure illnesses, and reestablish connections between family members and their *akua* (gods). Today, trained practitioners are formally teaching the *ho'oponopono* methods, and there has been a resurgence of its use. The state courts have implemented a formal *ho'oponopono* program that is designed to help families to resolve their problems outside the courtroom.

Civic Associations – Prior to Annexation, Native Hawaiians were active participants in the political life of the Islands. Political associations were organized to protest against the Bayonet Constitution of 1887 and subsequent annexation efforts.[84] Hawaiian Civic Clubs were established at the turn of century to campaign against the destitute and unsanitary living conditions of Hawaiians in the city of Honolulu and its outskirts.[85] These associations still exist, and count among their membership many of Hawai'i's most distinguished native leaders. In addition, Hawaiians living on Hawaiian Home Lands have, from the program's beginning in 1921, established homestead associations. The oldest of these associations, the *KALAMA'ULA HOMESTEAD ASSOCIATION*, is an *amicus* in this brief.

La'au Lapa'au (Hawaiian Healing) – Quietly practiced over the past two centuries following European contact, Hawaiian medicine has always been an important alternative to Western medical care. Today, it is credible form of treatment for many.[86] Practitioners use Hawaiian medicinal plants

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[84] *Hui Kalai'āina*, a Hawaiian political organization, lobbied for the replacement of the 1887 Bayonet Constitution, and led mass, peaceful protests that stalled negotiations for a new Treaty of Reciprocity. *Kuykendall, supra* note 5, vol. III, at 448; *Silva, supra* note 27, at 45.

[85] Davianna Pomaika'i McGregor, *'Āina Ho'opulapula: Hawaiian Homesteading*, 24 The Hawaiian Journal of History 1, 4-5 (1990).

[86] Isabella Aiona Abbott, *La'au Hawai'i: Traditional Uses of Hawaiian Plants* 135 (1992); Nanette L. Kapulani Mossman Judd, *La'au Lapa'au: herbal healing among contemporary Hawaiian healers*, 5 Pacific

(*la'au*), massage (*lomilomi*), and spiritual counseling to heal. Hawaiian health centers, established with federal financial support,[87] now incorporate traditional Hawaiian healing methods into their regimens of care.

Hālau Hula (*Hula* Academies) – Once banned by missionaries as a sacrilege, the ancient art of *hula*,[88] accompanied by chanting in the native tongue, flourishes today. *Hālau* exist throughout the islands, and *hula* and chants are now regularly incorporated into public ceremonies.

Voyaging/Celestial Navigation – Ancient Hawaiians were skilled navigators, finding their way thousands of miles across the open Pacific using only the stars and the currents as guides. In the 1970's, a group of Hawaiians formed the Polynesian Voyaging Society. The Society researched Polynesian canoe-making and navigating traditions, and commissioned the construction of an historically authentic double-hulled voyaging canoe, the *Hokule'a* ("Star of Gladness"). A Native Hawaiian crew was trained to sail the canoe, and a Native Hawaiian navigator was chosen to learn the art of celestial navigation from one of its few remaining Polynesian practitioners. The canoe's first voyage to Tahiti in 1976 was tremendously successful. It confirmed the sophisticated navigational skills of ancient Polynesians and also instilled a

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Health Dialog Journal of Community Mental Health and Clinical Medicine for the Pacific: The Health of Native Hawaiians 239-45 (1998).

[87] These traditional methods of healing are recognized and financed through appropriations under the Native Hawaiian Healthcare Act of 1988, Pub. L. No. 100-579, 102 Stat. 2916 (now codified at 42 U.S.C. §§ 11701, *et seq.*).

[88] "[A] few chanters, dancers, and teachers among the *po'e hula* [hula people] kept alive the more traditional forms, and with the flowering of the 'Hawaiian Renaissance' in the 1970's their knowledge and dedication became a foundation for revitalizing older forms." Dorothy B. Barrére, Mary Kawena Pukui & Marion Kelly, *Hula Historical Perspectives* 1-2 (1980). *Hula* was recently designated the state dance. Act 83, Relating To Hula (June 22, 1999) (to be codified at Haw. Rev. Stat. Chapter 5).

sense of pride in Hawaiian culture.[89] Other canoes have been built, and more voyages made since (the *Hokule'a* is currently sailing to the tiny island of *Rapa Nui* – Easter Island).[90] The art of voyaging is alive and well in modern Hawai'i, a testament to the skill and courage of the ancient navigators who first settled these islands.

Hawaiians today live in a markedly different world from the one that shaped their ancient practices. Yet they struggle to perpetuate a culture passed down to them through two millennia. In the words of a plaintive song written by one of OHA's trustees:

> *Me na mea 'oi loa mai na wa mamua, o holomua kakou i keia au*
>
> (Let us move forward to the future, carrying with us the best of the past)
>
> *E mau ana ka ha'aheo, ka ha'aheo o ka nohona*
>
> (The pride endures, the pride in our way of life)
>
> *E kukulu a'e kakou no ke ea o ka 'aina me ke aloha a me ke ahonui.*
>
> (Let us press forward together for the life of our land, in the spirit of love and patience)[91]

---

[89] Ben Finney, *Voyage of Rediscovery: A Cultural Odyssey through Polynesia* (1995). In 1995, the *Hokule'a* and *Hawai'iloa* sailed to the Marquesas Islands. PBS recently broadcast an hour-long documentary of this voyage entitled *Wayfinders – A Pacific Odyssey. See http://pbs.org/wayfinders.*

[90] *Hokule'a* left Hawai'i on June 15, 1999 for *Rapa Nui. See* http://leahi.kcc.hawaii.edu/org/pvs for reports on the voyage's progress and educational programs and materials.

[91] *E Mau ana ka Ha'aheo* (The Pride Endures) by S. Haunani Apoliona (1991)

CONCLUSION

Amici respectfully request that the decision of the court of appeals be affirmed.

DATED: Honolulu, Hawai'i, July 28, 1999.

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(10)

In The

Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAI'I,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF FOR THE HAWAI'I CONGRESSIONAL DELEGATION AS AMICUS CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the United States Congress has the constitutional authority to recognize that a special relationship exists between the United States and the indigenous people of the United States, and to enact laws to protect the rights, lands, and resources of those indigenous people, and whether in the exercise of that constitutional authority and with the agreement of a State, the Congress may delegate certain responsibilities to a State with an additional authorization for the State to assume a public trust for the betterment of the conditions of the native people of that State in a manner provided by the constitution and laws of the State.

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INTEREST OF AMICUS CURIAE [1]

As members of the United States Congress, we have an interest in a ruling by this Court which reaffirms the constitutional authority of the Congress to address the conditions of the native people of the United States and to assure that all of America's indigenous peoples are afforded comparable constitutional, statutory, and trust protections. The Petitioner in effect asks this Court to reverse Congress' long-standing political classification of the native people of Hawai'i as an indigenous people entitled to the same constitutional considerations as other indigenous groups within our republican scheme, and to divest Native Hawaiians of their status as Native Americans.

As members of the State of Hawai'i's congressional delegation, we have a particularized interest in the validation of the Federal laws which have been enacted to provide for the indigenous people of Hawai'i and the actions taken by the State of Hawai'i in furtherance of its Federally-delegated responsibilities.

Senator Daniel K. Inouye served in the Hawai'i Territorial Legislature from January, 1955 until July, 1959. In August, 1959, the Senator began his service in the United States House of Representatives, and since January, 1963, he has served in the United States Senate. Senator Inouye has been a member of the Senate Committee on Indian Affairs for twenty-one years, serving as the Committee's Chairman for eight years and Vice Chairman for the past five years. Senator Daniel K. Akaka is the first United

---

[1] Pursuant to this Court's Rule 37.6, *amici* state that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amici*, its counsel, and Alu Like, Inc. made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amici* state that the parties consented to the filing of this brief in letters filed with this Court.

States Senator of Native Hawaiian ancestry. He represented the State of Hawai'i in the United States House of Representatives from 1976 to 1990, and has served in the United States Senate and as a member of the Senate Committee on Indian Affairs since 1990.

Representative Patsy T. Mink served in the Hawai'i Territorial Legislature from 1956 to 1959 and in the Hawai'i State Senate from 1962 to 1964. Mrs. Mink has served in the United States House of Representatives from 1965 to 1977, and from 1990 to the present. Representative Neil Abercrombie served as a member of the Hawai'i State Legislature from 1974 to 1986, and has represented the State of Hawai'i in the United States House of Representatives since 1991.

STATEMENT OF THE CASE

For the past two hundred and ten years, the United States Congress, the Executive, and this Court have recognized certain legal rights and protections for America's indigenous peoples. The instant Petition asserts violations of the Fourteenth and Fifteenth Amendments to the United States Constitution, without addressing the long-settled constitutional and historical status of America's indigenous peoples, including the native people of Hawai'i and their lands.

Since the founding of the United States, Congress has exercised its constitutional authority over indigenous affairs and has undertaken an enhanced duty of care for America's indigenous peoples. Congress has done this in recognition of the sovereignty possessed by the native people – a sovereignty which pre-existed the formation of the United States. The Congress' constitutional authority is also premised upon the indigenous people's status as the original inhabitants of this nation who occupied and exercised dominion and control over the lands to which the United States subsequently acquired legal title.

The United States recognizes a special political relationship with the indigenous people of the United States.

The indigenous people are Native Americans – American Indians, Alaska Natives and Native Hawaiians. In furtherance of this relationship, the Congress has enacted over 6,000 laws which give expression to the respective legal rights and responsibilities of the Federal government and the native people.

From time to time, with the consent of the affected States, the Congress has sought to more effectively address the conditions of the indigenous people by delegating Federal responsibilities to various States. In 1959, the State of Hawai'i assumed the Federally-delegated responsibility of administering 203,500 acres of land that had been set aside under Federal law for the benefit of the native people of Hawai'i. Haw. Const. art. XVI, § 7. In addition, the State agreed to the imposition of a public trust upon all of the lands ceded to the State upon admission. Hawai'i Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 5 (1959). One of the five purposes for which the public trust is to be carried out is for the "betterment of the conditions of native Hawaiians." *Id.* The Federal authorization for this public trust clearly anticipated that the State's constitution and laws would provide for the manner in which the trust would be carried out. *Id.* §§ 4 & 5(f).

In 1978, the citizens of the State of Hawai'i exercised this Federally-delegated authority by amending the State constitution in furtherance of the special relationship with Native Hawaiians. The delegates to the 1978 constitutional convention recognized that Native Hawaiians had no other homeland, and thus that the protection of Native Hawaiian subsistence rights to harvest the ocean's resources, to fish the fresh streams, to hunt and gather, to exercise their rights to self-determination and self-governance, and the preservation of Native Hawaiian culture and the Native Hawaiian language could only be accomplished in the State of Hawai'i.

The amendments to the State constitution adopted by the citizens of Hawai'i to fulfill the special relationship with Native Hawaiians is consistent with the practice of

other States that have established special relationships with the native inhabitants of their areas. Fourteen States have extended recognition to Indian tribes that are not recognized by the Federal government, and thirty-two States have established commissions and offices to address matters of policy affecting the indigenous citizenry. *See* App. B.

The Petitioner's claims essentially challenge the Congress' constitutional authority to establish a special relationship with the native people of Hawai'i, to enact laws addressing their unique circumstances as indigenous people, and to delegate to the State of Hawai'i certain responsibilities for the protection of the lands set aside for native Hawaiians and for the betterment of their conditions.

SUMMARY OF THE ARGUMENT

This Court has frequently affirmed the Congress' authority to establish a political classification consisting of Native Americans. This Court has also recognized that this constitutionally-based authority is not constrained by the manner in which the native people are organized nor by their ethnological origins. *United States v. Kagama*, 118 U.S. 375 (1886); *Delaware Tribal Bus. Comm. v. Weeks*, 430 U.S. 73 (1977); *see also Pence v. Kleppe*, 529 F.2d 135, 138-39, n. 5 (9th Cir. 1976). The Congress has exercised its constitutional authority in furtherance of the special relationship it has established with the native people of Hawai'i through the enactment of 160 Federal laws which explicitly include Native Hawaiians in the class of Native Americans. *See* App. A.

This Court has also affirmed Congress' authority to delegate Federal responsibilities for administering relations with Native Americans to the States. *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979). In the Hawai'i Admission Act, the United States delegated its principal responsibilities under the Hawaiian Homes Commission Act to the new State. As a

further condition of statehood, the United States imposed a public trust on lands ceded to the State for five purposes, one of which was the "betterment of the conditions of native Hawaiians." Hawai'i Admission Act, § 5(f), 73 Stat. at 6. The Admission Act makes clear that the United States anticipated that the State of Hawai'i's constitution and laws would provide for the manner in which the Hawaiian Homes Commission Act and the public trust would be administered. *Id.*

In the debates of the State's constitutional convention in 1978, the convention delegates repeatedly refer to these Federally-delegated responsibilities with which the State is charged as the authorization for the amendments they propose to the State's constitution. *See* App. D. Thereafter, Hawai'i's citizens voted to adopt the proposed amendments, including the amendment which established the Office of Hawaiian Affairs (OHA) and the election procedures for OHA's Board of Trustees. Since that time, neither the Congress nor the Executive of the United States has ever challenged the amendments, the establishment of the Office of Hawaiian Affairs or the manner in which the Trustees of OHA are elected. Rather, the Congress has enacted laws that expressly recognize the State's role in addressing the conditions of Native Hawaiians and that authorize the Office of Hawaiian Affairs to administer Federal programs. *See, e.g.*, Carl D. Perkins Vocational and Technical Education Act of 1998, 20 U.S.C. § 2301 *et seq.* (1998); Native American Programs Act Amendments of 1987, 42 U.S.C. § 2991 *et seq.* (1998).

The provisions of Hawai'i's Constitution – all consistent with Federal law and policy and all approved by the State's general electorate – are a lawful expression of Congress' delegation to the State of Hawai'i, with the State's consent, of Federal obligations to protect the rights of Native Hawaiians and their lands and resources. Although the United States has also retained the responsibility to address the conditions of the native people of Hawai'i, the State and Federal governments have concluded that their joint effort, reflected in the

Hawai'i Admission Act and the Hawai'i Constitution, can best serve the needs of this particular indigenous group.

INTRODUCTION

There is a history, a course of dealings and a body of law which clearly address the issues raised by the Petitioner in this case. It is a history that begins well before the first European set foot on American shores – it is a history of those who occupied and possessed the lands that were later to become the United States – the aboriginal, indigenous, native people of this land who were America's first inhabitants.

The indigenous people did not share similar customs or traditions. Their cultures were diverse. Some of them lived near the ocean and depended upon its bounty for their sustenance. Others made their homes amongst the rocky ledges of mountains and canyons. Some native people fished the rivers, while others gathered berries and roots from the woodlands, harvested rice in the lake areas, and hunted wildlife on the open plains. Their subsistence lifestyles caused some to follow nomadic ways, while others established communities that are well over a thousand years old.

Those who later came here called them "aborigines" or "Indians" or "natives" but the terms were synonymous. Over time, these terms have been used interchangeably to refer to those who occupied and possessed the lands of America prior to European contact.

Although the differences in their languages, their cultures, their belief systems, their customs and traditions, and their geographical origins may have kept them apart and prevented them from developing a shared identity as the native people of this land – with the arrival of western "discoverers" in the United States, their histories are sadly similar. Over time, they were dispossessed of their homelands, removed, relocated, and thousands, if not millions, succumbed to diseases for

which they had no immunities and fell victim to the efforts to exterminate them.

In the early days of America's history, the native people's inherent sovereignty informed the course of the newcomers' dealings with them. Spanish law of the 1500 and 1600's presaged how the United States would recognize their aboriginal title to land, and treaties became the instruments of fostering peaceful relations. Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942).

As America's boundaries expanded, new territories came under the protection of the United States. Eventually, as new States entered the Union, there were other aboriginal, indigenous, native people who became recognized as the "aborigines" or "Indians" or "natives" of contemporary times – these included the Eskimos, and the Aleuts, and the other native people of Alaska, and later, the indigenous, native people of Hawai'i.

For nearly a century, Federal law has recognized these three groups – American Indians, Alaska Natives, and Native Hawaiians – as comprising the class of people known as Native Americans. Well before there was a history of discrimination in this country which the Fourteenth and Fifteenth Amendments were designed to address, this Court had recognized the unique status of America's native peoples under the Constitution and laws of the United States.

The Petitioner urges this Court to adopt a new and most novel distinction that vests in the native people of this land the power to determine, solely by the manner in which they organize themselves, the scope of the constitutional authority exercised by the Congress and the President of the United States. Under the Petitioner's theory, if the native people have not organized themselves as "tribes," then the Executive and Legislative branches of our government do not have the Constitutional authority to establish policies and enact laws which are designed to address their conditions. Implicit in the Petitioner's new construction of the Constitution is the

proposition that the Congress c[annot delegate to the States any authority to address th[e special circumstances of Native Americans who are not tribally-organized, and the States cannot undertake action[s relating to the native people on their own initiative.

Reduced to their essence, t[he Petitioner's claims depend upon a finding by this Co[urt that the provisions of the Constitution which have gi[ven rise to a two hundred and ten year history of Fe[deral legislative enactments, numerous expressions of Fe[deral policy, and a one hundred and sixty-seven-year-old [body of this Court's jurisprudence relating to the nativ[e people of the United States should either be set aside [for purposes of this action, or re-interpreted in such [a manner as to render them inapposite and inapplicable [to this case. To effectively address the Petitioner's cha[rge to this Court, there is clearly much work to be undo[ne.

ARGUMENT

I. THE UNITED STATES CONG[RESS HAS THE CONSTITUTIONAL AUTHORITY [TO ADDRESS THE CONDITIONS OF THE IND[IGENOUS, NATIVE PEOPLE OF THE UNITED S[TATES.

This Court has so often addre[ssed the scope of Congress' constitutional authority to [address the conditions of the native people that it is nov[v well-established.[2]

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[2] "The power of the general g[overnment over these remnants of a race once powerful, now [weak and diminished in numbers, is necessary to their protectio[n, as well as to the safety of those among whom they dwell[. It must exist in that government, because it never has [existed anywhere else, because the theater of its exercise is [within the geographical limits of the United States . . . From [their very weakness and helplessness, so largely due to the c[ourse of dealing of the federal government with them, and th[e treaties in which it has been promised, there arises the duty o[f protection, and with it the power. This has always been recog[nized by the executive,

Although the authority has been characterized as "plenary," *Morton v. Mancari*, 427 U.S. 535 (1974), its exercise is subject to judicial review. *Weeks*, 430 U.S. 73; *United States v. Sioux Nation*, 448 U.S. 371 (1980).[3] It has been held to encompass not only the native people within the original territory of the thirteen states but also lands that have been subsequently acquired. *United States v. Sandoval*, 231 U.S. 28 (1913).

The ensuing course of dealings with the indigenous people has varied from group to group, and thus, the only general principles that apply to relations with the first inhabitants of this nation is that they were dispossessed of their lands, often but not always relocated to other lands set aside for their benefit, and that their subsistence rights to hunt, fish, and gather have been recognized under treaties and laws, but not always protected nor preserved.[4]

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and by congress, and by this court, whenever the question has arisen." *Kagama*, 118 U.S. at 384.

[3] The rulings of this Court make clear that neither the conferring of citizenship upon the native people, the allotment of their lands, the lifting of restrictions on alienation of native land, the dissolution of a tribe, the emancipation of individual native people, the fact that a group of natives may be only a remnant of a tribe, the lack of continuous Federal supervision over the Indians, nor the separation of individual Indians from their tribes would divest the Congress of its constitutional authority to address the conditions of the native people. *Cherokee Nation v. Hitchcock*, 187 U.S. 294 (1902); *United States v. Celestine*, 215 U.S. 278 (1909); *Tiger v. Western Inv. Co.*, 221 U.S. 286 (1911); *United States v. Nice*, 241 U.S. 591 (1916); *Chippewa Indians v. United States*, 307 U.S. 1 (1939); *Weeks*, 430 U.S. 73; *United States v. John*, 437 U.S. 634 (1978).

[4] The courts have recognized and reaffirmed the subsistence rights to hunt, fish and gather of American Indians, Alaska Natives and Native Hawaiians. *Confederated Tribes of Warm Springs Res. v. United States*, 177 Ct. Cl. 184 (1966); *Mitchel v. United States*, 34 U.S. (9 Pet.) 711 (1835); *United States v.*

Some commentators have suggested that no other group of people in America has been singled out so frequently for special treatment, unique legislation, and distinct expressions of Federal policy. Although the relationship between the United States and its native people is not a history that can be said to have followed a fixed course, it is undeniably a history that reveals the special status of the indigenous people of this land. Our laws recognize that the native people do not trace their lineage to common ancestors, and from time to time, our laws have in fact discouraged the indigenous people from organizing themselves as "tribes." But this much we think is true – that for the most part, at any particular time in our history, our laws have attempted to treat the native people, regardless of their genealogical origins and their political organization, in a consistent manner.

The Petitioner asserts that the scope of constitutional authority vested in the Congress is constrained by the manner in which the native people organize themselves. If they are not organized as tribes, then the Congress lacks the authority to enact laws and the President is without authority to establish policies affecting the native people of the United States. However, the original language proposed for inclusion in the Constitution made no reference to "tribes" but instead proposed that the Congress be vested with the authority "[t]o regulate affairs with the Indians as well within as without the limits of the United States." 2 *The Records of the Federal Convention of 1787*, 321 (Max Farrand ed., Yale Univ. Press 1966). A further refinement suggested that the language read,

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Washington, 384 F. Supp. 312 (W.D. Wash. 1974), *aff'd*, 520 F.2d 676 (9th Cir. 1975); *Six Nations v. United States*, 173 Ct. Cl. 899 (1965); *United States v. Santa Fe Pac. R.R.*, 314 U.S. 339 (1941); *Sac & Fox Tribe v. Licklider*, 576 F.2d 145 (8th Cir. 1978); *United States v. Klamath & Moadoc Tribes*, 304 U.S. 119 (1938); *Alaska Pac. Fisheries v. United States*, 248 U.S. 78 (1918); *Kalipi v. Hawaiian Trust Co.*, 656 P.2d 745 (Haw. 1982); *Pele Defense Fund v. Paty*, 837 P.2d 1247 (Haw. 1992).

"and with Indians, within the Limits of any State, not 'subject to the laws thereof.' " *Id.* at 367.

The exchanges of correspondence between James Monroe and James Madison concerning the construction of what was to become Article I, Section 8, Clause 3 of the Constitution make no reference to Indian tribes, but they do discuss Indians.[5] Nor is the term "Indian tribe" found in any dictionaries of the late eighteenth century, although the terms "aborigines" and "tribe" are defined.[6]

Whether the reference was to "aborigines" or to "Indians," the Framers of the Constitution did not import a meaning to those terms as a limitation upon the authority of the Congress, but as descriptions of the native people who occupied and possessed the lands that were later to become the United States – whether those lands

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[5] In his letter to James Monroe of November 27, 1784, James Madison observes, "[t]he foederal articles give Congs. the exclusive right of managing all affairs with the Indians not members of any State, under a proviso, that the Legislative authority, of the State within its own limits be not violated. By Indian[s] not members of a State, must be meant those, I conceive who do not live within the body of the Society, or whose Persons or property form no objects of its laws. In the case of Indians of this description the only restraint on Congress is imposed by the Legislative authority of the State." 2 *The Founders' Constitution* 529 (Philip B. Kurland & Ralph Lerner ed., 1987) (Letter from Madison to Monroe of 11/27/1784); *see also supra* (Letter from Monroe to Madison of 11/15/1784).

[6] The term "aborigines" is defined as "the earliest inhabitants of a country, those of whom no original is to be traced," and the term "tribe" is defined as "a distinct body of the people as divided by family or fortune, or any other characteristic." *A Dictionary of the English Language* (Samuel Johnson ed. 1755) The annotations accompanying the term "Indian" in the 1901 Oxford dictionary indicate the use of the term as far back as 1553. *Oxford English Dictionary* (James A.H. Murray ed. 1901).

lay within the boundaries of the original thirteen colonies, or subsequently-acquired territories. This more logical construction is consistent with more than two hundred Federal statutes which establish that the aboriginal inhabitants of America are a class of people known as "Native Americans" and that this class includes three groups – American Indians, Alaska Natives, and Native Hawaiians.

The native people of Alaska were not organized as tribes, nor did they have treaties with the United States. Nonetheless, in 1934, in enacting the Indian Reorganization Act, the Congress established that "[f]or purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians."[7] Two years later, the Congress amended the Act to provide a right to organize under the Act for "groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district. . . . " 25 U.S.C. § 473a (1998).

In his effort to exclude the native people of Hawai'i from the class of Native Americans, the Petitioner notes that Native Hawaiians have not organized themselves as tribes and further asserts that the Congress has drawn a distinction between the native people of the continental United States and the native people of Hawai'i on the basis of race.[8] But the Petitioner's assertion ignores the

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[7] Indian Reorganization Act, 25 U.S.C. § 479 (1998); Opinion of the Interior Solicitor, 49 I.D. 592 (1923) (concluding that "[t]he relations existing between (the Alaska Natives) and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States. . . . ")

[8] "The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes

fact that for many years, blood quantum was also commonly employed in Federal statutes with reference to American Indians and Alaska Natives,[9] and the Federal courts have similarly noted the practice of the Congress to classify native people on the basis of blood quantum.[10] The matter was addressed by this Court in 1974, in *Morton*.[11]

Commission Act, 1920, § 201, 42 Stat. 108 (1921). When capitalized, the term "Native Hawaiian" is commonly used in Federal statutes to refer to "any individual who is a descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in the area that now constitutes the State of Hawai'i." Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510 (1993).

[9] Act of June 18, 1934, Pub. L. No. 73-383, ch. 576, 48 Stat. 984, 988 (codified at 25 U.S.C.A. §§ 479 & 480) (1934) (defining "Indian" as tribal members, descendants of tribal members residing within reservation boundaries on June 1, 1934 and other persons of one-half or more Indian blood and limiting eligibility for certain loans to persons of at least one-quarter degree of Indian blood); Act of June 30, 1919, ch. 4, § 1, 41 Stat. 9 (codified at 25 U.S.C. § 163) (1919) (authorizing the Secretary of the Interior to prepare a final membership roll for any tribe, specifying age and blood quantum).

[10] "It is plain the Congress, on numerous occasions, has deemed it expedient, and within its powers, to classify Indians according to their percentages of Indian blood. Indeed, if legislation is to deal with Indians at all, the very reference to them implies the use of 'a criterion of race'. Indians can only be defined by their race." *Simmons, Jr. v. Chief Eagle Seelatsee*, 244 F.Supp. 808 (E.D. Wash. 1965), aff'd, 384 U.S. 209 (1966). *See also, United States v. First Nat'l Bank of Detroit, Minn.*, 234 U.S. 245 (1914); *United States v. Ferguson*, 247 U.S. 175 (1918).

[11] "Literally every piece of legislation dealing with Indian tribes and reservations, and certainly all legislation dealing with the BIA, single out for special treatment a constituency of tribal Indians living on or near reservations. If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination,

"The Congress has exercised its constitutional authority through the enactment of 160 Federal laws that either provide for the specific needs or conditions of Native Hawaiians or include Native Hawaiians in the class of Native Americans to be affected by those laws. *See* App. A.

The cultures, languages, traditions, religious belief systems, and the governance structures adopted by the native people of this land are not the same. The indigenous people have no common race or ethnicity. Not all native people have treaties with the United States. Felix S. Cohen, *Handbook of Federal Indian Law*, p. 405 (1942 ed.). Their organization into tribal units is not the hallmark of their status as Native Americans, nor does their recognition by the United States depend upon the continuous existence of a governing entity. *Chippewa Indians*, 307 U.S. 1. Rather, Native Americans have a unique relationship with the United States because they were the original inhabitants of this nation, and they were independent and self-governing at the time of contact. Under the Constitution and consistent, continuous Congressional practice, the classification of Native Americans is neither tribal nor racial, but political.

II. THE UNITED STATES CONGRESS HAS ESTABLISHED THAT AMERICAN INDIANS, ALASKA NATIVES AND NATIVE HAWAIIANS ARE THE INDIGENOUS, NATIVE PEOPLE OF THE UNITED STATES.

Clearly, the Constitution vests the Congress with the power and authority to manage relations with American Indians. For more than a century, Congress has also exercised that authority to address the conditions of Alaska Natives and Native Hawaiians. Following this Court's

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an entire Title of the United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized." 417 U.S. at 552.

guidance that our government's relations with the native people are primarily political relationships which are subject to changing circumstances, the Federal courts have generally deferred to the Legislative and Executive branches of the government in fashioning and adapting the terms of those relationships.

Over time, the circumstances of the native people have changed dramatically, in no small part because of radical shifts in Federal policies which have ranged from war, removal, relocation, and termination to recognition, reorganization, restoration, and finally, self-determination and self-governance.

The first native people with whom our national government entered into relations were American Indians. The peaceful course of dealings with them was shaped by treaties, Executive Orders and acts of Congress. Although the native people of Alaska are recognized as ethnologically diverse from American Indians, and although they had no treaties with the United States and were not organized as tribes, as a function of Federal law, they are shareholders in Native regional and village corporations that hold title to Native lands and resources. Alaska Native Claims Settlement Act, 43 U.S.C. § 1606(h) (1998).

Today, in the expression of their self-determination and self-governance, American Indians and Alaska Natives are playing a critical role in the development of Federal law and policy, and are assuming increasingly greater responsibilities for the administration of Federal programs and services. Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450 *et seq.* (1998).

In 1993, the United States Congress and the President of the United States enacted a Joint Resolution acknowledging the one-hundredth anniversary of the January 17, 1893 overthrow of the Kingdom of Hawai'i, extending an apology to the Native Hawaiian people on behalf of the United States for the overthrow of the Kingdom of Hawai'i. Act of Nov. 23, 1993, Pub. L. No. 103-150, 107 Stat. 1510. That resolution declared that,

> The Congress – (1) on the occasion of the 100th anniversary of the illegal overthrow of the Kingdom of Hawai'i on January 17, 1893, acknowledges the historical significance of this event which resulted in the suppression of the inherent sovereignty of the Native Hawaiian people; (2) recognizes and commends efforts of reconciliation initiated by the State of Hawai'i . . . [and] (3) apologizes to Native Hawaiians on behalf of the people of the United States for the overthrow of the Kingdom of Hawai'i on January 17, 1893 with the participation of agents and citizens of the United States, and the deprivation of the rights of Native Hawaiians to self-determination.

Id.

In the exercise of their right to self-determination and self-governance, Native Hawaiians are engaged in the active consideration of the manner in which they will give expression to their inherent sovereignty. As with the Indian tribes with whom the United States terminated relations and later restored to Federally-recognized status, *see* App. C, the Congress has expressly recognized that the inherent sovereignty of the native people, be they Indian or Native Hawaiian, does not depend for its existence on Federal action.

Such is the nature of the special, political relationships that the United States has carried on with the indigenous, native people of America for the last two hundred years. Each of these relationships has been defined at times with surgical precision, but also with all-encompassing legislative enactments designed to address matters of health, education, housing, employment and training, the preservation of native cultures and languages, the protection of native religions and sacred sites, and the repatriation of Native American human remains.

The more comprehensive enactments of recent times reflect a contemporary reality that is shared by Native Americans, regardless of where they reside or whether

they are American Indian, Alaska Native, or Native Hawaiian. The statistics on America's indigenous people illustrate why such measures have been enacted: the highest rates of mortality associated with various diseases and health conditions in the American population; the greatest need for housing in the United States, including the highest rates of homelessness, substandard dwellings and overcrowding; substantially below-average performance on measures of educational achievement; and rates of unemployment that in many native communities average well above fifty percent and range as high as ninety-five percent.

The native people of the United States are the only Americans who have experienced the disinterment of the human remains of their relatives and families by the thousands, as well as the desecration of graves and sacred sites in similar numbers – a phenomenon which necessitated the enactment of a Federal law, the Native American Graves Protection and Repatriation Act, 25 U.S.C. § 3001 *et seq.* (1998). Native Hawaiians have been included in the scope of these comprehensive legislative enactments not only because they are indigenous people with whom the United States has recognized a special relationship, but also because the challenges they face in health status, education, housing, poverty and the appalling disposition of their human remains appear to be the lingering vestiges of a history that is sadly common to all the native people of the United States.

The Congress has enacted over 200 Federal laws addressing the shared conditions of Native Americans. More than 6,000 Federal laws have been enacted specifically for American Indians, 245 for Alaska Natives, and 160 for Native Hawaiians.[12]

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[12] The number of Federal laws enacted for the benefit of Native Americans, and those for Alaska Natives, includes only those laws which have been enacted since 1973.

If the constitutional authority of the Congress to address the conditions of the indigenous people of the United States has been exercised more expansively as new States have joined the Union, it is because the native people were not "Indians" in the ethnological sense, but they are "aborigines" in the political sense. The Congress, the President of the United States, and the State and Federal courts have all recognized this classification of Native Americans as one which arises out of Federal law and policy, and which is fundamentally political in nature.

III. THE UNITED STATES CONGRESS HAS DELEGATED AUTHORITY TO THE STATES TO ADDRESS THE CONDITIONS OF THE INDIGENOUS, NATIVE PEOPLE OF THE UNITED STATES.

The manner in which the authority of the States and the Federal government would be exercised in relation to the indigenous, native people of the United States has proven to be a challenging issue from the earliest days of our history as a nation.[13]

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[13] On January 22, 1788, James Madison observed, "The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the articles of confederation, which render the provision obscure and contradictory. The power is there restrained to Indians, not members of any of the States, and is not to violate or infringe the legislative right of any State within its own limits. What description of Indians are to be deemed members of a State, is not yet settled; and has been a question of frequent perplexity and contention in the Foederal Councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority, without so far intruding on the internal rights of legislation, is absolutely incomprehensible. This is not the only case in which the articles of confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union, with complete sovereignty in the States; to subvert a mathematical axiom, by taking away a part, and letting the whole remain." 2 *The Founders' Constitution* at 530.

In 1790, the Congress crafted the first Act to regulate trade and intercourse with the Indians, rendering invalid any sale of Indian lands to any person or State in the absence of an authorization by the United States. Indian Non-Intercourse Act, 25 U.S.C. § 177 (1998).

Later, upon their entry into the Union, several States disavowed the exercise of jurisdiction over the native people and their lands. In 1889, the Enabling Act through which the States of Washington, Montana, North Dakota, and South Dakota secured admission into the Union required that the constitutional conventions of the new States enact provisions by which the people would disclaim title to lands owned by Indians or Indian tribes and would acknowledge that such lands were to remain "under the absolute jurisdiction and control" of the Congress until the United States title was extinguished. The disclaimers were to be made "by ordinances irrevocable without the consent of the United States and the people of the States."[14] Similar disclaimers are found in the enabling or admission Acts of the States of Utah, Oklahoma, Arizona, and New Mexico. Act of July 16, 1894, ch. 138, 28 Stat. 107 (1894) (Utah); Act of June 16, 1906, ch.

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[14] Act of Feb. 22, 1889, § 4, 25 Stat. 676 (1889) (providing that, "[t]he constitutions shall be republican in form, and make no distinction in civil or political rights on account of race or color, except as to Indians not taxed, . . . " and "[t]hat the people inhabiting said proposed States do agree and declare that they forever disclaim all right and title . . . to all lands lying within said limits owned or held by any Indian or Indian tribes; and that until the title thereto shall have been extinguished by the United States, the same shall be and remain subject to the disposition of the United States, and said Indian lands shall remain under the absolute jurisdiction and control of the Congress of the United States. . . . ")

3335, 34 Stat. 267 (1906) (Oklahoma); Act of June 20, 1910, ch. 310, 36 Stat. 557 (1910) (Arizona and New Mexico).

However, Federal authority over indigenous affairs has also been delegated to several States. 25 U.S.C. §§ 232 & 233 (1998) (New York); Act of June 8, 1940, ch. 276, 54 Stat. 249 (1940) (Kansas); Act of May 31, 1946, ch. 279, 60 Stat. 229 (1946) (North Dakota); Act of June 30, 1948, ch. 759, 62 Stat. 1161 (1948) (Iowa). In 1953, the Congress enacted the first jurisdictional statute of general application to Indian lands, vesting certain States with authority to exercise jurisdiction over criminal offenses and civil causes of actions committed or arising on Indian reservations within those States. Act of Aug. 15, 1953, Pub. L. No. 83-280, 67 Stat. 588 (1953). That delegation of authority has been sustained by this Court as an appropriate exercise of the Congress' constitutional authority. *Yakima Indian Nation*, 439 U.S. 463.

Public Law 83-280 was enacted during a period when Federal policy endorsed the termination of reservations, the assimilation of native people into the dominant society, and the divestiture of Federal responsibilities relating to Native Americans. This Federal policy was well-established in its implementation at the time the State of Hawai'i was admitted into the Union, and may well explain the absence of the customary disclaimer of state jurisdiction over the native peoples. Instead, the United States delegated its responsibilities under the Hawaiian Homes Commission Act to the State of Hawai'i, and charged the new State with a public trust and affirmative responsibilities to assure "the betterment of the conditions of native Hawaiians." Hawai'i Admission Act, §§ 4 & 5(f), 73 Stat. 4.

Thirty-two other States have established special commissions or offices to address the conditions of the native people. *See* App. B. Fourteen States carry on formal relations with the indigenous people, even though for the most part, there is no explicit delegation of Federal authority to do so. These States have extended State recognition to forty-nine tribes, even though those tribes

are not recognized by the Federal government. *See* App. B. Nonetheless, these "state-recognized" tribes are eligible for certain Federal programs and services. *See, e.g.*, Native American Programs Act, 42 U.S.C. § 2991 *et seq.* (1998); Indian Health Care Improvement Act, 25 U.S.C. § 1601 *et seq.* (1998); National Historic Preservation Act, 16 U.S.C. § 470 *et seq.* (1998).

IV. THE UNITED STATES CONGRESS HAS DELEGATED AUTHORITY TO THE STATE OF HAWAI'I TO ADDRESS THE CONDITIONS OF THE INDIGENOUS, NATIVE PEOPLE OF HAWAI'I.

> At first contact with Europeans, the Hawaiian Islands supported the largest and most densely settled population of any Polynesian island group. There are various estimates of early population, before the ravages of foreign disease took their toll, but a figure of 200,000 Hawaiians is usually regarded as conservative . . . The contact-period society of Hawai'i stands out as one of the most sophisticated, complex, and developed of the many hundreds of indigenous societies and cultures dispersed throughout the Pacific.

Patrick Vinton Kirch, *Feathered Gods and Fishhooks*, pp. 2 & 7 (1985).

A. The Hawaiian Homes Commission Act

Although the present litigation arises out of actions taken by the citizens of Hawai'i pursuant to Federally-delegated authority in the Hawai'i Admission Act, nearly 40 years earlier the United States had set-aside lands in Hawai'i for the benefit of Hawai'i's native people. The administration of this Federal law, the Hawaiian Homes Commission Act, was one impetus for the amendments proposed to the State's constitution in 1978 affecting Native Hawaiians.

In 1826 it was estimated that there were 142,650 full-blooded Hawaiians in the Hawaiian islands. By 1919 their numbers had been reduced to 22,600. Historically, the Hawaiian's subsistence lifestyles required that they live near the ocean to fish and near fresh water streams to irrigate their staple food crop (taro) within their respective ahupua'a.[15] Beginning in the early 1800's, more and more land was being made available to foreigners and was eventually leased to them to cultivate pineapple and sugar cane. Large numbers of Hawaiians were forced off the lands that they had traditionally occupied. As a result, they moved into the urban areas, often lived in severely-overcrowded tenements and rapidly contracted diseases for which they had no immunities.

Interior Department Secretary, Franklin K. Lane, observed in testimony before the House Committee on Territories, "[o]ne thing that impressed me there was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty." H.R. Rep. No. 66-839, at 4 (1920). By 1920, there were many others who were also concluding that the native people of Hawai'i were a "dying race," and that if they were to be saved from extinction, they must have the means of regaining their connection to the land, the 'āina.[16]

The effort to "rehabilitate" this dying race by returning them to the land led Congress to enact the Hawaiian Homes Commission Act on July 9, 1921. The Act sets aside 203,500 acres of public lands (former Crown and

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[15] The ahupua'a is a traditional division of land which is triangular in nature, and encompasses lands from the mountain top to the sea. *Territory v. Bishop Trust Co., Ltd.*, 41 Haw. 358, 361 (Haw. 1956).

[16] 'Aina means land. Pukui, Mary K., and Elbert, Samuel H., *Hawaiian Dictionary*, Honolulu (Univ. of Hawai'i Press, 1986).

Government lands acquired by the United States upon Annexation) for homesteading by native Hawaiians. Hawaiian Homes Commission Act, 1920, § 203, 42 Stat. at 109. Congress analogizes the Act to "previous enactments granting Indians . . . special privileges in obtaining and using the public lands." H.R. Rep. No. 66-839, at 11 (1920).[17]

The Act provides that the lessee must be a native Hawaiian, who is entitled to a lease for a term of ninety-nine years, provided that the lessee occupy and use or cultivate the tract within one year after the lease is entered into. A restriction on alienation, like those imposed on Indian lands subject to allotment, was included in the lease. Also like the General Allotment Acts affecting Indians, 25 U.S.C. §§ 331-334, 339, 342, 348, 349, 354, 381 (1998), the leases were intended to encourage rural homesteading so that native Hawaiians would leave the urban areas and return to rural subsistence or commercial farming and ranching. In February, 1923, the Congress amended the Act to permit one-half acre residence lots and to provide for home construction loans. Thereafter, the demand for residential lots far exceeded the demand for agricultural or pastoral lots. Office of State Planning, Office of the Governor, Pt. I, 1 *Report on Federal Breaches of the Hawaiian Home Lands Trust*, 4-6 (1992).

For the next forty years, during the Territorial period (1921-1959) and the first two decades of statehood (1959-1978), inadequate funding forced the Department of Hawaiian Home Lands to lease its best lands to non-Hawaiians in order to generate operating funds. There was little income remaining for the development of infrastructure or the settlement of Hawaiians on the home

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[17] "Your committee's opinion is further substantiated by the brief of the attorney general of Hawai'i . . . and the written opinion of the solicitor of the Department of Interior. . . . " H.R. Rep. No. 66-839, at 11.

lands. The lack of resources – combined with questionable transfers and exchanges of Hawaiian home lands, and a decades-long waiting list of those eligible to reside on the home lands – rendered the home lands program a tragically illusory promise for most native Hawaiians. *Id.* at 12.

B. Hawai'i Admission Act

As a condition of statehood, the Hawai'i Admission Act required the new State to adopt the Hawaiian Homes Commission Act and imposed a public trust on the lands ceded to the State. The 1959 Compact between the United States and the People of Hawai'i by which Hawai'i was admitted into the Union expressly provides that:

> As a compact with the United States relating to the management and disposition of the Hawaiian home lands, the Hawaiian Homes Commission Act, 1920, as amended, ***shall be adopted*** as a provision of the Constitution of said State, as provided in section 7, subsection (b) of this Act, ***subject to amendment or repeal only with the consent of the United States, and in no other manner***: *Provided*, That (1) . . . the Hawaiian home-loan fund, the Hawaiian home-operating fund, and the Hawaiian home-development fund ***shall not be reduced or impaired*** by any such amendment, whether made in the constitution or in the manner required for State legislation, and the encumbrances authorized to be placed on Hawaiian home lands by officers other than those charged with the administration of said Act, ***shall not be increased, except with the consent of the United States***; (2) that ***any amendment to increase the benefits to lessees of Hawaiian home lands may be made in the constitution, or in the manner required for State legislation***, but the ***qualifications of lessees shall not be changed except with the consent of the United States***; and (3) that all proceeds and income from the 'available lands', as defined by said Act, ***shall be used only in carrying out the provisions of said Act***.

Hawai'i Admission Act, § 4, 73 Stat. at 5 (emphasis added).

> The lands granted to the State of Hawai'i by subsection (b) of this section and public lands retained by the United States under subsections (c) and (d) and later conveyed to the State under subsection (e), together with the proceeds from the sale or other disposition of any such lands and the income therefrom, ***shall be held by said State as a public trust*** for the support of the public schools and other public educational institutions, ***for the betterment of the conditions of native Hawaiians***, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible for the making of public improvements, and for the provision of lands for public use. ***Such lands, proceeds, and income shall be managed and disposed of for one or more of the foregoing purposes in such manner as the constitution and laws of said State may provide***, and ***their use for any other object shall constitute a breach of trust for which suit may be brought by the United States***.

Id. § 5(f), 73 Stat. at 6 (emphasis added).

These were explicit delegations of Federal authority to be assumed by the new State. They were not discretionary. The language is not permissive. The United States did not absolve itself from any further responsibility in the administration or amendment of the Hawaiian Homes Commission Act. Nor did the United States divest itself of any ongoing role in overseeing the use of ceded lands or the income or proceeds therefrom. Rather, as the Federal and State courts have repeatedly held, the United States retains the authority to bring an enforcement action against the State of Hawai'i for breach of the section 5(f) trust. *Han, et al. v. United States*, 45 F.3d 333 (9th Cir. 1995); *Pele Defense Fund*, 837 P.2d 1247.

Under the Petitioner's theory, there are no circumstances under which the State of Hawai'i could assume the responsibilities of the Hawaiian Homes Commission Act or fulfill one of the section 5(f) purposes – "the betterment of the conditions of native Hawaiians" – without violating the guarantees of the Fourteenth Amendment to the United States Constitution. But the Congress expressly found that the 1950 Hawai'i State Constitution is "republican in form and in conformity with the Constitution of the United States . . . and is hereby accepted, ratified and confirmed." Hawai'i Admission Act, § 1, 73 Stat. 4.

By 1959, the constitutional authority of the Congress to provide for the conditions of the indigenous people of the United States was well established. The inclusion of sections 4 and 5(f) in the Admission Act is constitutional and is consistent with the body of Federal law and policy which had recognized Native Hawaiians as indigenous, native people of the United States for nearly fifty years. *See* App. A.

C. The Hawai'i Constitutional Convention of 1978

The convening of a constitutional convention is a significant event in most states, and it was not different in Hawai'i. While the claims in this case compel a focus on the establishment of the Office of Hawaiian Affairs, the delegates to the 1978 Constitutional Convention addressed a range of issues related to the native people of Hawai'i. The citizens of Hawai'i subsequently adopted amendments to the State's constitution that reflected a broad-based concern that the conditions of the native people of Hawai'i would require a carefully-considered and comprehensive approach.[18] In addition, the fifty-seven years of

[18] The State's constitutional amendments: (1) recognize the traditional and customary rights Hawaiians exercise for subsistence, cultural, and religious purposes, Haw. Const. art. XII, § 7; (2) direct the State to establish a Hawaiian education program consisting of language, culture, and history in the public schools, *id.* art. X, § 4; (3) provide for the protection of natural resources, particularly the fresh water and ocean resources which are so vital to the native peoples' way of life, *id.* art. XI; (4) reaffirm the public lands trust and establish the Office of Hawaiian Affairs, *id.* art. XII, §§ 4, 5 and 6; (5) reaffirm the trust provisions of the Hawai'i Admission Act, *id.* art. XVI, § 8; (6) establish the Hawaiian language as one of the two official languages of the State, *id.* art. XV, § 4; (7) adopt the former King Kamehameha I's Law of the Splintered Paddle as the symbol of the State's concern for public safety, *id.* art. IX, § 10; and (8) provide for a State motto: "Ua mau ke ea o ka 'āina i ka pono" or "[t]he life of the land is perpetuated in righteousness," *id.* art. XVI, § 5.

experience with the Hawaiian Homes Commission Act program informed the debates in Hawai'i's 1978 Constitutional convention.[19] *See also* App. D.

The Federal policy supporting the rights of native people to self-determination and self-governance had been in place for ten years, and it is clear that the delegates to the convention were looking not only at the past experience under the Hawaiian Homes Commission Act but toward a future when the native people of Hawai'i might be afforded the opportunity to express their right to self-determination and self-governance. Thus, in the Report of the Committee of

[19] One of the delegates to the convention presented the following information on the home lands program: "Today over 113,000 acres of DHHL [Department of Hawaiian Home Lands] lands are leased to the public through leases, revocable permits or licenses. Another 16,000 acres are under governor executive orders, this all coming prior to 1972. Another 22,000 acres are utilized by federal, state and county agencies without document, and another 40,000 acres are classified as conservation. In all, 85 percent of DHHL lands (170,000 acres) are utilized by the general public; 12 percent have actually been utilized by the intended beneficiaries, or 400 acres per annum have been transferred to native Hawaiians since 1920." Debates in Committee of the Whole, 1978 Proceedings of the Constitutional Convention for the State of Hawai'i, 411 (Sept. 2, 1978).

the Whole on the proposed amendments establishing the Office of Hawaiian Affairs, it was stated,

> "The Committee recognizes the right of native Hawaiians to govern themselves and their assets by their assumption of the trust responsibility imposed on the State to better their condition . . . The Committee intends this section to be broad enough to include within its scope the administration and management of the native Hawaiian lands trust created by the Hawaiian Homes Commission Act of 1920 . . . The consolidation of the two trusts [Hawaiian home lands and section 5(f) trusts] under the control and management of a single board would facilitate the attainment of the objective of the two trusts: to provide for the betterment of the conditions of native Hawaiians . . . Your Committee concluded that these Sections 5 and 6, taken together, are of utmost importance for they provide for accountability, self-determination, methods for self-sufficiency through assets and a land base, and the unification of all native Hawaiian people."[20]

The objectives to be achieved through the establishment of the Office of Hawaiian Affairs are remarkably similar to the goals that were the focus of this Court's consideration in *Morton*.[21]

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[20] Proceedings of the Constitutional Convention of Hawai'i of 1978, Journal and Documents, Standing Comm. Rep. No. 59, Vol. I, p. 643.

[21] "The purpose of these preferences, as variously expressed in the legislative history, has been to give Indians a greater participation in their own self-government; to further the Government's trust obligation toward the Indian tribes; and to reduce the negative effect of having non-Indians administer matters that affect Indian tribal life . . . The overriding purpose of that particular Act [Indian Reorganization Act of 1934] was to establish machinery whereby Indian tribes would be able to assume a great degree of self-government, both politically and economically . . . The solution ultimately adopted was to strengthen tribal government while continuing the active role of the BIA, with the understanding that the Bureau would be more responsive to the interests of the people it was created to serve . . . [Section 12] was intended to integrate the Indians into the government service connected with the administration of his affairs." 417 U.S. 535.

In keeping with the manner in which the other native people of the United States exercise their right to self-determination and self-governance, the citizens of Hawaii voted to adopt the constitutional amendment establishing the Office of Hawaiian Affairs and also approved the means by which OHA Trustees would be elected. No eligible voting citizen of Hawaii was excluded from exercising this franchise.

Since 1968, the United States has recognized and supported the native peoples' right to self-determination and self-governance. The legislative history of the 1978 Hawai'i State Constitutional Convention makes clear that in establishing the Office of Hawaiian Affairs, the citizens of Hawai'i sought to provide Native Hawaiians with the means to exercise their rights to self-determination and self-governance, consistent with Federal law and policy. As forecast by the delegates to the constitutional convention, *see* App. D, at the appropriate time this exercise in self-governance would be wedded with the exercise of responsibility for administering the lands set aside for native Hawaiians, and the expression of sovereignty which had been lost with the overthrow of the Hawaiian kingdom could once again be made manifest.

CONCLUSION

The Congress has the constitutional authority to establish a political classification of Native Americans consisting of American Indians, Alaska Natives, and Native Hawaiians and to enact laws affecting Native Americans. The Congress has recognized a special relationship with the native people

of Hawai'i and has enacted 160 Federal laws addressing the conditions of Native Hawaiians based upon their status as indigenous people of the United States. The Congress also has the constitutional authority to delegate Federal responsibilities to the State of Hawai'i to provide for the betterment of the conditions of Native Hawaiians and to protect lands set aside under Federal law for their benefit. The establishment of the Office of Hawaiian Affairs and the election of OHA Trustees approved by the citizens of Hawai'i to carry out the responsibilities with which the State of Hawai'i was charged in the 1959 Admission Act is an appropriate exercise of its Federally-delegated authority.

Dated, July 28, 1999

Respectfully submitted,

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APPENDIX A

Table of Federal Acts Affecting Native Hawaiians

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of June 21, 1910	Pub. L. No. 61-266, 36 Stat. 703, 718 (1910)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indian and Native Hawaiians.
Act of Mar. 4, 1911	Pub. L. No. 62-525, 36 Stat. 1363, 1395 (1911)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Aug. 24, 1912	Pub. L. No. 63-302, 37 Stat. 417, 436 (1912)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 23, 1913	Pub. L. No. 63-3, 38 Stat. 4, 26 (1913)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Aug. 1, 1914	Pub. L. No. 63-161, 38 Stat. 609, 625 (1914)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.

Act of Mar. 3, 1915	Pub. L. No. 63-263, 38 Stat. 822, 838 (1915)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 1, 1916	Pub. L. No. 64-132, 39 Stat. 262, 279 (1916)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 12, 1917	Pub. L. No. 65-21, 40 Stat. 105, 122 (1917)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 19, 1919	Pub. L. No. 66-21, 41 Stat. 163, 181 (1919)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 1, 1918	Pub. L. No. 65-181, 40 Stat. 634, 651 (1918)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of June 5, 1920	Pub. L. No. 66-246, 41 Stat. 874, 891 (1920)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 4, 1921	Pub. L. No. 66-388, 41 Stat. 1367, 1383 (1921)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of July 9, 1921	Pub. L. No. 66-34, 42 Stat. 108 (1921)	Creates a homesteading program for Native Hawaiians.
Act of June 12, 1922	Pub. L. No. 67-240, 42 Stat. 635, 643 (1922)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Feb. 3, 1923	Pub. L. No. 67-403, 42 Stat. 1221 (1923)	Amends Hawaiian Homes Commission Act by increasing dollar limits for residential loans and other provisions.

Act of Feb. 13, 1923	Pub. L. No. 67-409, 42 Stat. 1227, 1235 (1923)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of June 7, 1924	Pub. L. No. 68-214, 43 Stat. 521, 528 (1924)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Mar. 3, 1925	Pub. L. No. 68-586, 43 Stat. 1198, 1206 (1925)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Apr. 22, 1926	Pub. L. No. 69-141, 44 Stat. 305, 315 (1926)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Feb. 11, 1927	Pub. L. No. 69-600, 44 Stat. 1069, 1079 (1927)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Mar. 7, 1928	Pub. L. No. 70-105, 45 Stat. 246 (1928)	Amends the Hawaiian Homes Commission Act by requiring an annual area disposal limit and increases the dollar amount within the Hawaiian Home Loan fund.
Act of May 16, 1928	Pub. L. No. 70-400, 45 Stat. 573, 583 (1928)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians, including excavation and preservation of archaeologic remains.
Act of Feb. 20, 1929	Pub. L. No. 70-778, 45 Stat. 1230, 1241 (1929)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.
Act of Apr. 19, 1930	Pub. L. No. 71-158, 46 Stat. 229, 241 (1930)	Authorizes appropriations for the Smithsonian Institute for ethnological research of American Indians and Native Hawaiians.

Act of July 26, 1935	Pub. L. No. 74-223, 49 Stat. 504 (1935)	Requires three of five Hawaiian Homes Commission members to be at least one-quarter Native Hawaiian.
Act of July 10, 1937	Pub. L. No. 75-200, 50 Stat. 497, 503 (1937)	Amends Hawaiian Homes Commission Act by establishing age minimum for lessee and adding more lands under the Act.
Act of June 20, 1938	Pub. L. No. 75-680, § 3, 52 Stat. 784, 784-85 (1938)	Authorizes leasing land within the Hawai'i National Park to Native Hawaiians and recognizes limited Native Hawaiian fishing rights in the area.
Act of Nov. 26, 1941	Pub. L. No. 77-325, § 3, 55 Stat. 782, 782 (1941)	Amends Hawaiian Homes Commission Act by creating a Home Development fund and allowing investing of loan fund.
Act of May 31, 1944	Pub. L. No. 78-320, 58 Stat. 260, 264 (1944)	Amends Hawaiian Homes Commission Act by returning lands under the Commission's jurisdiction to the Territory of Hawai'i .

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of June 14, 1948	Pub. L. No. 80-638, 62 Stat. 390 (1948)	Amends Hawaiian Homes Commission Act by authorizing churches, hospitals, schools, theaters, and the Federal government to use the land.
Act of July 9, 1952	Pub. L. No. 82-481, 66 Stat. 511, 514 (1952)	Amends Hawaiian Homes Commission Act by adding lands to the Commission's jurisdiction.
Act of July 9, 1952	Pub. L. No. 82-482, 66 Stat. 514 (1952)	Amends Hawaiian Homes Commission Act by increasing dollar amounts in the Hawaiian Homes Land Fund and the Hawaiian Homes Development Fund.
Act of June 18, 1954	Pub. L. No. 83-417, 68 Stat. 263 (1954)	Amends Hawaiian Homes Commission Act by authorizing leases for irrigated pastoral lands.

Hawai'i Admission Act, Act of Mar. 18, 1959	Pub. L. No. 86-3, § 5(f), 73 Stat. 4, 6 (1959)	Admits Hawai'i as a State and establishes a public trust for the betterment of the conditions of Native Hawaiians, as defined by the Hawaiian Homes Commission Act.
Act of Dec. 23, 1963	Pub. L. No. 88-233, 77 Stat. 472 (1963)	Protects the corpus of the public lands trust, whose intended beneficiaries are Native Hawaiians, by revising procedures under the Hawai'i Statehood Act.
Act of July 11, 1972	Pub. L. No. 92-346, 86 Stat. 457 (1972)	Designates Honokohau as a National Historical Landmark and authorizes preservation of the site, giving employment preference to and providing training for Native Hawaiians.
Native American Programs Act of 1974	Pub. L. No. 93-644, § 801, 88 Stat. 2291, 2324 (1975)	Promotes Native Hawaiian, American Indian, and Alaska Native economic and social self-sufficiency through financial assistance to agencies serving Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Departments of Labor and Health, Education, and Welfare Appropriation Act, 1976	Pub. L. No. 94-206, 90 Stat. 3 (1975)	Appropriates funds for Native American programs (includes Native Hawaiians).
Act of Oct. 17, 1976	Pub. L. No. 94-518, § 401-405, 90 Stat. 2447, 2447, 2449 (1976)	Preserves Kalaupapa Settlement and authorizes a preference for former patients and Native Hawaiians to manage the site.
Act of Aug. 5, 1977	Pub. L. No. 95-93, sec. 303, § 701(a), 91 Stat. 627, 650 (1977)	Amends the Comprehensive Employment Training Act of 1973 to include employment training programs for Native Hawaiians.
Joint Resolution, American Indian Religious Freedom	Pub. L. No. 95-341, 92 Stat. 469 (1978)	Recognizes the rights American Indians, Eskimos, Aleuts, and Native Hawaiians to practice their traditional religions.

Act of Nov. 20, 1979	Pub. L. No. 96-123, 93 Stat. 923 (1979)	Appropriates funds for Native Hawaiian health and human services programs as allowed under authorizing legislation, including assistance to research institutions with Indian, Alaska Native, Native Hawaiian, Hispanic, and Black students.
Education Amendments of 1980	Pub. L. No. 96-374, § 1331, 94 Stat. 1367, 1499 (1980)	Creates Advisory Council on Native Hawaiian Education to study the effectiveness of State and Federal education programs for Native Hawaiians.
Act of Dec. 22, 1980	Pub. L. No. 96-565, §§ 101-110, 94 Stat. 3321, 3321-23 (1980)	Establishes Kalaupapa National Historic Park which shall be administered by Hansen's Disease patients and Native Hawaiians.
Urgent Supplemental Appropriations Act, 1982	Pub. L. No. 97-216, 96 Stat. 180 (1982)	Appropriates funds for nursing research grants and encourages that priority be given to Native Hawaiians, other Native Americans, native American Pacific islanders, and Hispanics.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Supplemental Appropriations Act, 1982	Pub. L. No. 97-257, 96 Stat. 818 (1982)	Appropriates funds to promote economic and social self-sufficiency of Native Americans, including Native Hawaiians; also appropriates funds for Native Hawaiian education and health programs as allowed under authorizing legislation.
Act of July 30, 1983	Pub. L. No. 98-63, 97 Stat. 301 (1983)	Appropriates funds to address the unique health needs of Native Americans, including Native Hawaiians; also urges the National Cancer Institute to give greater attention to the Native Hawaiian population.
Native Hawaiian Study Commission Act	Pub. L. No. 96-565, §§ 301-307, 94 Stat. 3321, 3324-27 (1980)	Establishes Native Hawaiian Study Commission to study the culture, needs, and concerns of Native Hawaiians.

Department of Health and Human Services Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds to the Administration for Native Americans which promotes social and economic self-sufficiency for Native Americans. including Native Hawaiians; also appropriates funds to combat alcoholism among Native Hawaiians and declares Native Hawaiian cancer research a priority.
Department of Labor Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds for vocational training and other labor services for Native Hawaiians and other Native Americans.
Department of Education Appropriation Act, 1984	Pub. L. No. 98-139, 97 Stat. 871 (1983)	Appropriates funds for Native Hawaiian education programs as allowed under authorizing legislation.
Act of Dec. 21, 1982	Pub. L. No. 97-377, 96 Stat. 1830 (1982)	Appropriates funds to address alcohol abuse among Native Hawaiians.
Act of Aug. 22, 1984	Pub. L. No. 98-396, 99 Stat. 1369 (1984)	Appropriates funds for a Native Hawaiian health study and report.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Act of Oct. 12, 1984	Pub. L. No. 98-473, 99 Stat. 1837 (1984)	Appropriates funds for historic preservation of marine resources, including the Hawaiian voyaging canoe Hokule'a.
Department of Health and Human Services Appropriation Act, 1985	Pub. L. No. 98-619, 99 Stat. 3305 (1984)	Appropriates funds for Native Hawaiian programs to promote economic and social self-sufficiency; also appropriates funds for parent-child centers and for Native Hawaiian cancer research.
Department of Education Act, 1985	Pub. L. No. 98-619, 99 Stat. 3305 (1984)	Appropriates funds for Native Hawaiian education programs as allowed under authorizing legislation.
Act of Dec. 19, 1985	Pub. L. No. 99-190, 99 Stat. 1185 (1985)	Appropriates funds for education assistance to health profession students who will serve geographical concentrations of Native Hawaiians and Indian reservations.

American Indian, Alaska Native and Native Hawaiian Culture and Art Development Act	Pub. L. No. 99-498, §§ 1501-1503, 1521-1522, 100 Stat. 1268, 1600, 1610-11 (1986)	Authorizes grants to support a program for Native Hawaiian culture and arts development.
Anti-Drug Abuse Act of 1986	Pub. L. No. 99-570, § 4134, 100 Stat. 3207, 3207-134 (1986)	Authorizes the Health and Human Services Secretary to contract with organizations that provide drug abuse prevention, education, treatment, and rehabilitation services to Native Hawaiians.
Act of July 11, 1987	Pub. L. No. 100-71, 101 Stat. 391 (1987)	Appropriates funds for the Native Hawaiian Culture and Arts Development Program.
Native American Programs Act Amendments of 1987	Pub. L. No. 100-175, sec. 506, § 803A, 101 Stat. 926, 926-75 (1987)	Establishes Native Hawaiian Revolving loan fund for Native Hawaiian organizations and Native Hawaiians to promote economic development.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Health and Human Services Appropriations Act, 1988	Pub. L. No. 100-202, 101 Stat. 1329-263 (1987)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Jacob K. Javits Gifted and Talented Students Education Act of 1988	Pub. L. No. 100-297, sec. 1001, §§ 4101-4108, 102 Stat. 130, 237 (1988)	Authorizes grants or contracts with institutions (including Indian tribes and Native Hawaiian organizations) to carry out programs or projects designed to meet the educational needs of gifted and talented students.
Drug-Free Schools and Communities Act of 1986	Pub. L. No. 100-297, sec. 1001, §§ 5112, 5134, 102 Stat. 130, 253, 261 (1988)	Authorizes education grants, cooperative agreements, or contracts with organizations that primarily serve and represent Native Hawaiians; also appropriates funds for drug abuse education and prevention programs for Native Hawaiians.

Augustus F. Hawkins-Robert T. Stafford Elementary and Secondary School Improvement Amendments of 1988	Pub. L. No. 100-297, §§ 4001-4009, 102 Stat. 130, 358 (1988)	Recognizes the Federal government's legal responsibility to enforce Hawai'i 's trust responsibilities to Native Hawaiians and creates new education programs targeting a model curriculum, family based education centers, gifted and talented, and special education programs.
Veterans' Benefits and Services Act of 1988	Pub. L. No. 100-322, § 413, 102 Stat. 487, 487 (1988)	Adds Native Hawaiians to the Advisory Committee on Native American Veterans which evaluates programs for Native American veterans.
Indian Housing Act of 1988	Pub. L. No. 100-358, sec. 2, § 204, 102 Stat. 676, 679 (1988)	Requires assessment of the housing and mortgage needs of Native Hawaiians.
National Science Foundation University Infrastructure Act of 1988	Pub. L. No. 100-418, § 6402, 102 Stat. 1107, 1543 (1988)	Reserves percentage of appropriation for institutions of higher learning that serve Native Americans (including Native Hawaiians) and specific ethnic groups.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Health and Human Services Appropriations Act, 1989	Pub. L. No. 100-436, 102 Stat. 1688 (1988)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Native Hawaiian Health Care Act of 1988	Pub. L. No. 100-579, 102 Stat. 2916 (1988); Pub. L. No. 100-690, § 2301-2312, 102 Stat. 4181, 4223 (1988)	Authorizes programs to improve the health status of Native Hawaiians; authorizes grants or contracts with Papa Ola Lokahi to develop comprehensive heath care master plan to improve Native Hawaiian health.
Health Professions Reauthorization Act of 1988	Pub. L. No. 100-607, sec. 604, § 751, 102 Stat. 3048, 3126 (1988)	Provides health professionals with incentives to staff health centers serving Native Hawaiians, Indians, and rural areas.

Nursing Shortage Reduction and Education Extension Act of 1988	Pub. L. No. 100-607, sec. 714-715, § 836(h), 102 Stat. 3048, 3161 (1988)	Authorizes grants to nursing schools, loan repayment incentives to encourage work with Native Hawaiians, Indians, or in rural areas, and scholarship grants to nursing schools whose students serve two years at an Indian Heath Service facility or a Native Hawaiian health center.
Handicapped Programs Technical Amendments Act of 1988	Pub. L. No. 100-630, sec. 102, § 616, 102 Stat. 3289, 3296 (1988)	Amends the Education of the Handicapped Act which provides handicapped Native Hawaiian (and other native Pacific basin) children with a free appropriate public education.
Business Opportunity Development Reform Act of 1988 Small Business	Pub. L. No. 100-656, sec. 207, § 8(a), 102 Stat. 3853, 3861 (1988)	Amends the Small Business Act by including economically-disadvantaged Native Hawaiian organizations as socially and economically disadvantaged small business concerns.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Comprehensive Alcohol Abuse, Drug Abuse, and Mental Health Amendments Act of 1988	Pub. L. No. 100-690, sec. 2022, § 1912A, 102 Stat. 4181, 4194 (1988)	Amends the Public Health Service Act by establishing the formula to fund comprehensive substance abuse and treatment programs for Native Hawaiians.
Indian Health Care Amendments of 1988	Pub. L. No. 100-713, sec. 106, § 338J, 102 Stat. 4784, 4787 (1988)	Amends the Public Health Service Act by creating a Native Hawaiian Health Professions Scholarship program.
Department of Health and Human Services Appropriations Act, 1990	Pub. L. No. 101-166, 103 Stat. 1166 (1989)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Department of Education Appropriations Act, 1990	Pub. L. No. 101-166, 103 Stat. 1179 (1989)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.

National Museum of the American Indian Act	Pub. L. No. 101-185, 103 Stat. 1336 (1989)	Establishes the National Museum of the American Indian which will study Native Americans, collect, preserve, and exhibit Native American objects, provide a Native American research and study program, and authorizes the return of Smithsonian-held Native American human remains and funerary objects; Native Americans includes Native Hawaiians.
Department of Housing and Urban Development Reform Act of 1989	Pub. L. No. 101-235, §§ 601-605, 103 Stat. 1987, 2052 (1989)	Establishes commission to study and propose solutions to Indian, Alaska Native, and Native Hawaiian housing problems.
Veterans' Benefits Amendments of 1989	Pub. L. No. 101-237, sec. 312, § 3102, 103 Stat. 2062 (1989)	Authorizes the study of Native Hawaiian veterans' and other Native American veterans' participation in Veterans Affairs' home loan guaranty program.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Dire Emergency Supplemental Appropriation for Disaster Assistance, Food Stamps, Unemployment Compensation Administration, and Other Urgent Needs, and Transfers, and Reducing Funds Budgeted for Military Spending Act of 1990	Pub. L. No. 101-302, 104 Stat. 213, 239 (1990)	Authorizes appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian housing and provides grant money to Indian and Hawaiian Native youth for the Drug-Free Schools and Communities Act.
Native American Languages Act	Pub. L. No. 101-477, §§ 101-104, 104 Stat. 1152, 1154 (1990)	Adopts the policy to preserve, protect, and promote the rights and freedom of Native Americans to use, practice, and develop Native American languages; Native Americans include Native Hawaiians.

Department of Health and Human Services Appropriations Act, 1991	Pub. L. No. 101-517, 104 Stat. 2190 (1990)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1991	Pub. L. No. 101-517, 104 Stat. 2190 (1990)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Disadvantaged Minority Health Improvement Act of 1990	Pub. L. No. 101-527, sec. 4, § 782, 104 Stat. 2311, 2321 (1990)	Authorizes grants to health profession schools to assist programs of excellence for Native Hawaiians, other Native Americans, and specified ethnic groups.
Native American Graves Protection and Repatriation Act	Pub. L. No. 101-601, 104 Stat. 3048 (1990)	Provides for the protection of Native American graves and repatriation of funerary objects, human remains, and objects of cultural patrimony; Native Americans include Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Cranston-Gonzalez National Affordable Housing Act	Pub. L. No. 101-625, sec. 917, § 109, 104 Stat. 4079, 4398 (1990)	Authorizes appropriations for the Neighborhood Reinvestment Corporation which serves rural communities, Native Americans, Native Hawaiians, and other communities in need.
Act of Nov. 29, 1990	Pub. L. No. 101-644, sec. 401, § 338J(a), 104 Stat. 4662, 4668 (1990)	Amends the Public Health Service Act by providing scholarship assistance to Native Hawaiian students.
Act of Nov. 29, 1990	Pub. L. No. 101-644, sec. 501-502, §§ 1507, 1510, 104 Stat. 4662, 4668 (1990)	Amends the American Indian, Alaska Native, and Native Hawaiian Culture and Art Development Act by allowing interest and earnings to be used to carry out the Institute's responsibilities.
National Dropout Prevention Act of 1991	Pub. L. No. 102-103, sec. 311, § 103(b), 105 Stat. 497, 505 (1991)	Amends the Carl D. Perkins Vocational and Applied Technology Education Act by providing stipends to Native Hawaiian vocational students.

Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1992	Pub. L. No. 102-139, 105 Stat. 736 (1991)	Authorizes appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing.
Department of Health and Human Services Appropriations Act, 1992	Pub. L. No. 102-170, 105 Stat. 1107 (1991)	Appropriates funds for Native Hawaiian health programs under authorizing legislation.
Department of Education Appropriations Act, 1992	Pub. L. No. 102-170, 105 Stat. 1107 (1991)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Defense Appropriations Act 1992	Pub. L. No. 102-172, 105 Stat. 1150 (1991)	Amends the National Defense Authorization Act so that a disadvantaged small business concern includes a small business concern owned and controlled by socially and economically disadvantaged individuals, an Indian tribe, a Native Hawaiian organization, or an organization employing the severely disabled.
Act of Dec. 11, 1991	Pub. L. No. 102-218, sec. 1, § 317, 105 Stat. 1671 (1991)	Amends title 38 (Veterans' Benefits) to designate the Chief Minority Affairs Officer as an adviser on the effect of policies, regulations, and programs on Native Hawaiians, other Native Americans, women, and minority groups.

ADAMHA Reorganization Act (Alcohol, Drug Abuse, and Mental Health Administration)	Pub. L. No. 102-321, sec. 203, § 1953, 106 Stat. 323, 409 (1992)	Amends the Public Health Services Act by requiring the State of Hawai'i to contract with organizations which plan, conduct, and administer comprehensive substance abuse and treatment programs for Native Hawaiians.
Higher Education Amendments of 1992	Pub. L. No. 102-325, sec. 305, §§ 357(b)(7), 1406, 106 Stat. 448, 479, 818 (1992)	Amends the Higher Education Amendments of 1965 by authorizing Federal repayment of loan for nurses working in a Native Hawaiian Health Center (also in Indian Health Service); gives preference to Teacher Corps applicants intending to teach on Indian reservations or in Alaska Native villages or in areas with high concentrations of Native Hawaiians; also, authorizes biennial education survey on Native Hawaiians, other Native Americans, and other groups including the disabled, disadvantaged, and minority students.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Higher Education Facilities Act of 1992	Pub. L. No. 102-325, sec. 422, § 428J(a), 106 Stat. 448, 541 (1992)	Amends the Higher Education Act of 1965 by authorizing grants and fellowships to promote higher education of Indians, Alaska Natives, and Native Hawaiians, along with specified ethnic groups.
Job Training Reform Amendments of 1992	Pub. L. No. 102-367, sec. 401, § 401, 106 Stat. 1021, 1074 (1992)	Authorizes employment and recruitment preference for Native Hawaiians, Indians, and Alaska Natives for a new office that will administer Native American programs; also creates a Native American Employment and Training Council with membership of Indians, Alaska Natives, and Native Hawaiians that will solicit views on issues program operation and administration.

Older Americans Act Amendment of 1992	Pub. L. No. 102-375, sec. 201, § 201(c)(3), 106 Stat. 1195, 1203 (1992)	Amends the Older Americans Act Amendment of 1965 by creating an advocate for older Indians, Alaskan Natives, and Native Hawaiians to promote enhanced delivery of services and grants, and authorizes appropriations for these activities.
Native American Programs Act Amendments of 1992	Pub. L. No. 102-375, sec. 811, 822, §§ 803A, 811A, 106 Stat. 1195, 1295, 1296 (1992)	Amends Native American Programs Act by requiring the filing of annual report on the social and economic conditions of American Indians, Native Hawaiians, other Native American Pacific Islanders (including American Samoan Natives), and Alaska Natives, and authorizes appropriations for the Native American programs.
Department of the Interior and Related Agencies Appropriations Act, 1993	Pub. L. No. 102-381, 106 Stat. 1374 (1993)	Authorizes appropriations for the Alaska Native Culture and Arts Development Act which also provides funds for Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1993	Pub. L. No. 102-389, 106 Stat. 1571 (1992)	Provides for appropriations for the National Commission on American Indian, Alaska Native, and Native Hawaiian Housing in carrying out functions under the Department of Housing and Urban Development Reform Act of 1989.
Department of Health and Human Services Appropriations Act, 1993	Pub. L. No. 102-394, 106 Stat.1792 (1992)	Specifies funding guidelines for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1993	Pub. L. No. 102-394, 106 Stat.1792 (1992)	Appropriates funds for Native Hawaiian education programs under authorizing legislation.

Department of Defense Appropriations Act, 1993	Pub. L. No. 102-396, 106 Stat. 1876 (1993)	Amends the Native Hawaiian Health Care Act of 1988 by establishing health goals for Native Hawaiians and scholarships for Native Hawaiian health students.
Joint Resolution to consent to certain amendments enacted by the legislature of the State of Hawai'i to the Hawaiian Homes Commission Act, 1920.	Pub. L. No. 102-398, 106 Stat. 1953 (1992)	Agrees to the adoption of amendments enacted by the State of Hawai'i to the Hawaiian Homes Commission Act of 1920.
Veterans' Medical Programs Amendments of 1992	Pub. L. No. 102-405, § 123, 106 Stat. 1972, 1982 (1992)	Requires development of a plan to treat veterans' post-traumatic stress disorder, especially the needs of Native Hawaiians, other Native Americans, women, and ethnic minorities.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Health Professions Education Extension Amendments of 1992	Pub. L. No. 102-408, sec. 102, § 739, 106 Stat. 1992, 2055 (1992)	Amends the Public Health Services Act by authorizing grants to health professions schools to support programs of excellence in health professions education for Native Hawaiians, other Native Americans, and minority individuals.
Nurse Education and Practice Improvement Amendments of 1992.	Pub. L. No. 102-408, sec. 102, § 846, 106 Stat. 1992, 2031 (1992)	Amends the Public Health Service Act by authorizing the repayment of school loans for nurses who work two years in an Indian Health Service health center, in a Native Hawaiian health center, in a public hospital, in a migrant health center, in a community health center, in a rural health clinic, or in a public or nonprofit private health facility.

Veterans' Home Loan Program Amendments of 1992	Pub. L. No. 102-547, sec. 8, §§ 3761-3764, 106 Stat. 3633, 3639 (1992)	Amends Title 38 by providing direct housing loans to Native American veterans (including Native Hawaiians) and includes the Department of Hawaiian Homelands in the definition of "tribal organization."
Housing and Community Development Act of 1992	Pub. L. No. 102-550, sec. 128, § 605, 106 Stat. 3672 (1992)	Authorizes appropriations for National Commission on American Indians, Alaska Natives, and Native Hawaiian housing.
Hawai'i Tropical Forest Recovery Act.	Pub. L. No. 102-574, § 4, 106 Stat. 4593, 4597 (1992)	Establishes the Hawai'i Tropical Forest Recovery Task Force which will make recommendations for rejuvenating Hawaii's tropical forests, including the traditional practices, uses, and needs of Native Hawaiians in tropical forests.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
National Historic Preservation Act Amendments of 1992	Pub. L. No. 102-575, sec. 4002, 4006, §§ 2, 101, 106 Stat. 4600, 4753 (1992)	Amends the National Historic Preservation Act to protect Native Hawaiian, Indian, and Alaska Native religious and cultural sites, including authorizing direct grants to Indian tribes and Native Hawaiian organizations to preserve, stabilize, restore, or rehabilitate religious properties.
Veterans Health Care Act of 1992	Pub. L. No. 102-585, sec. 602, § 340B, 106 Stat. 4943, 4967 (1992)	Authorizes Native Hawaiian Health centers to purchase pharmaceuticals at the Federal government-negotiated price.
Department of Health and Human Services Appropriations Act, 1994	Pub. L. No. 103-112, Stat. 1082 (1993)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.

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Department of Education Appropriations Act, 1994	Pub. L. No. 103-112, Stat. 1082 (1993)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
100th Anniversary of the Overthrow of the Hawaiian Kingdom	Pub. L. No. 103-150, 107 Stat. 1510 (1993)	Acknowledges and apologizes for the United States' role in the overthrow of the Kingdom of Hawai'i .
Goals 2000: Educate America Act	Pub. L. No. 103-227, sec. 2-3, 108 Stat. 125, 129 (1994)	Establishes National Education Goals for schools and students from diverse backgrounds, including Indians, Alaska Natives, and Native Hawaiians, the disabled, and limited English-speakers.

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FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
School-to-Work Opportunities Act of 1994	Pub. L. No. 103-239, sec. 3-4, 108 Stat. 568, 572 (1994)	Establishes school-to-work activities to improve the knowledge and skills of youths from various backgrounds and circumstances, including disadvantaged students, students with diverse racial, ethnic, or cultural backgrounds, American Indians, Alaska Natives, Native Hawaiians, students with disabilities, students with limited-English proficiency, migrant children, school dropouts, and academically talented students.
Alaska Native Culture and Arts Development Act	Pub. L. No. 103-239, sec. 721, § 1521, 108 Stat. 568, 572 (1994)	Amends the Higher Education Act of 1986 by authorizing grants to organizations that primarily serve and represent Native Hawaiians or Alaska Natives to support Native culture and art programs.

Department of Health and Human Services Appropriations Act, 1995	Pub. L. No. 103-333, 108 Stat. 2539 (1994)	Authorizes appropriations for Native Hawaiian health.
Department of Education Appropriations Act, 1995	Pub. L. No. 103-333, 108 Stat. 2539 (1994)	Authorizes appropriations for Native Hawaiian education.
Department of Defense Appropriations Act, 1995	Pub. L. No. 103-335, 108 Stat. 2599 (1994)	Authorizes preference to Native Hawaiian contractors restoring Kaho'olawe's environment.
Safe and Drug-Free Schools and Communities Act of 1994	Pub. L. No. 103-382, sec. 101, §§ 4004, 4011, 4118, 108 Stat. 3518, 3674, 3674, 3685 (1994)	Authorizes grants for Native Hawaiian-serving institutions to plan, conduct, and administer violence and drug prevention programs.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Native Hawaiian Education Act	Pub. L. No. 103-382, sec. 101, § 9201-9212, 108 Stat. 3518, 3794 (1994)	Recognizes that Native Hawaiians are indigenous people and authorizes, among other things, grants to assist Native Hawaiians in achieving national education goals.
Jacob K. Javits Gifted and Talented Students Education Act of 1994	Pub. L. No. 103-382, sec. 101, § 10201, 108 Stat. 3518, 3820 (1994)	Authorizes grants and/or contracts to Native Hawaiian organizations and Indian tribes to assist in carrying out programs or projects for gifted/talented students.
Improving America's Schools Act of 1994	Pub. L. No. 103-382, sec. 101, § 13102, 108 Stat. 3518, 3878 (1994)	Provides support, training, assistance to grant recipients to improve the quality of education for immigrants, migrants, the poor, American Indians, Alaska Natives, and Native Hawaiians.
Bilingual Education Act	Pub. L. No. 103-382, sec. 101, §§ 7101, 7104, 7136, 108 Stat. 3518, 3716, 3718, 3732 (1994)	Authorizes grants to implement new comprehensive bilingual education programs for Native American and Native Hawaiian languages.

Improving America's Schools Act of 1994 (Part E)	Pub. L. No. 103-382, sec. 101, § 7501, 108 Stat. 3518, 3745 (1994)	Authorizes subgrants from State and local governments to implement a bilingual education program for the ancestral languages of American Indians, Alaska Natives, and Native Hawaiians.
Native American Veterans' Memorial Establishment Act of 1994	Pub. L. No. 103-384, § 2, 108 Stat. 4067, 4067 (1994)	Establishes memorial to recognize contributions of Native American Veterans (American Indians, Native Alaskans, and Native Hawaiians).
Veterans' Benefits Improvements Act of 1994	Pub. L. No. 103-446, sec. 510, § 544, 108 stat. 4645, 4669 (1994)	Authorizes creation of a Center for Minority Veterans and Advisory Committee on Minority Veterans to be more responsive to the needs of Native Hawaiian, American Indian, Alaska Native, and ethnic minority veterans.
Hawaiian Home Lands Recovery Act	Pub. L. No. 104-42, §§ 201-06, 109 Stat. 353, 357 (1995)	Settles Department of Hawaiian Home Lands claims against the Federal government for the value of the lost use of lands by Native Hawaiians.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
The Balanced Budget Down payment Act	Pub. L. No. 104-99, § 115, 110 Stat. 26, 29 (1996)	Authorizes appropriations to cover termination of Native Hawaiian and Alaska Native Cultural Arts
National Defense Authorization Act for FY 1996	Pub. L. No. 104-106, § 524, 110 Stat. 186 (1996)	Authorizes upgrading the Distinguished Service Cross to the Medal of Honor for World War II Native American Pacific Islander veterans (including Native Hawaiians).
Department of Health and Human Services Appropriations Act, 1996	Pub. L. No. 104-134, 110 Stat. 1321 (1996)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988.
Department of Education Appropriations Act, 1996	Pub. L. No. 104-134, 110 Stat. 1321 (1996)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.

Child Care and Development Block Grant Amendment of 1996	Pub. L. No. 104-193, sec. 614, § 658P, 110 Stat. 2105, 2287 (1996)	Amends the Child Care and Development Block Grant Act of 1990 by authorizing Native Hawaiian organizations to apply for grants or enter into contracts with the Health and Human Services Secretary to improve child care, increase the availability of early childhood development, and increase before and after school care services.
Departments of Veterans Affairs and Housing and Urban Development, and Independent Agencies Appropriations Act, 1997	Pub. L. No. 104-204, sec. 213, § 282, 110 Stat. 2874, 2904 (1996)	Authorizes the Housing Secretary to waive anti-discrimination provisions of the Cranston-Gonzalez National Affordable Housing Act for lands set aside under the Hawaiian Homes Commission Act, 1920.
Department of Health and Human Services Appropriations Act, 1997	Pub. L. No. 104-208, 110 Stat. 3009 (1996)	Authorizes appropriations for the Native Hawaiian Health Care Act of 1988 and Older Americans Act of 1965.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Department of Education Appropriations Act, 1997	Pub. L. No. 104-208, 110 Stat. 3009 (1996)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
National Museum of the American Indian Act Amendments of 1996	Pub. L. No. 104-278, sec. 4, § 11A, 110 Stat. 3355, 3356 (1996)	Amends National Museum of the American Indian Act by authorizing repatriation of Indian and Native Hawaiian sacred or funerary objects and cultural patrimony objects.
Joint Resolution to consent to certain amendments enacted by the legislature of the State of Hawai'i to the Hawaiian Homes Commission Act, 1920.	Pub. L. No. 105-21, 111 Stat. 235 (1997)	Agrees to the adoption of amendments enacted by the State of Hawai'i to the Hawaiian Homes Commission Act of 1920.

Department of Transportation and Related Agencies Appropriations Act, 1998	Pub. L. No. 105-66, 111 Stat. 1425 (1997)	Waives repayment of airport funds that were diverted for the betterment of American Indians, Alaska Natives, and Native Hawaiians.
Department of Health and Human Services Appropriations Act, 1998	Pub. L. No. 105-78, 111 Stat. 1467 (1997)	Authorizes appropriations for the Native Hawaiian Health Care Act and Older Americans Act of 1965.
Department of Education Appropriations Act, 1998	Pub. L. No. 105-78, 111 Stat. 1467 (1997)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Museum and Library Services Technical and Conforming Amendments of 1997	Pub. L. No. 105-128, sec. 6, § 262, 111 Stat. 2548, 2549 (1997)	Amends Museum and Library Services Act by authorizing Hawaiian organizations eligible to receive grants (along with American Indian tribes) to electronically link libraries with education, social, or information services.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Workforce Investment Act of 1998	Pub. L. No. 105-220, § 166, 112 Stat. 936, 1021 (1998)	Authorizes grants to Indian Tribes, tribal organizations, Alaska Native entities, Indian-controlled organizations, and Native Hawaiian organizations for employment and training activities.
Rehabilitation Act Amendments of 1998	Pub. L. No. 105-220, sec. 404, § 101 112 Stat. 936, 1163 (1998)	Amends the Rehabilitation Act of 1973 by requiring State agencies to consult with Indian Tribes, tribal organizations, and Native Hawaiian organizations before adopting any policies for vocational rehabilitation services.
Higher Education Amendments of 1998	Pub. L. No. 105-244, sec. 303, § 1001, 112 Stat. 1581, 1638 (1998)	Amends the Higher Education Act of 1965 by authorizing grants to improve education institutions' ability to serve Alaska Natives and Native Hawaiians.

Act of October 14, 1998	Pub. L. No. 105-256, sec. 12, § 10(b)(1), 112 Stat. 1896, 1899 (1998)	Amends the Native Hawaiian Health Care Improvement Act by requiring recipients of the Native Hawaiian Health Scholarship Program to work in the Native Hawaiian Health Care System.
Department of Health and Human Services Appropriations Act, 1999	Pub. L. No. 105-277, 112 Stat. 2681 (1998)	Authorizes appropriations to carry out the Native Hawaiian Heath Care Act of 1988 and the Older Americans Act.
Department of Education Appropriations Act, 1999	Pub. L. No. 105-277, 112 Stat. 2681 (1998)	Authorizes appropriations for Native Hawaiian education programs under authorizing legislation.
Head Start Amendments of 1998	Pub. L. No. 105-285, sec. 117, § 650, 112 Stat. 2702, 2727 (1998)	Amends the Head Start Act by requiring the Secretary of Health and Human Services to prepare and submit a report concerning the condition, location, and ownership of facilities used, or available to be used, by Native Hawaiian Head Start agencies.

FEDERAL ACT NAME	SESSION LAW CITE	SUMMARY
Assets for Independence Act	Pub. L. No. 105-285, §§ 401-416, 112 Stat. 2702, 2759 (1998)	Authorizes Native Hawaiian organizations (and State, local, and tribal governments) to conduct demonstration projects to evaluate the effects of savings, microenterprise, and home ownership on families and the community
Carl D. Perkins Vocational and Technical Education Act of 1998	Pub. L. No. 105-332, sec. 1, § 116, 112 Stat. 3076, 3095 (1998)	Authorizes grants to plan, conduct, and administer vocational programs for Native Hawaiians and other Native Americans.
Native American Programs Act Amendments of 1997	Pub. L. No. 105-361, sec. 3, § 803A, 112 Stat. 3278, 3278 (1998)	Amends the Native Hawaiian Revolving Loan fund to include a loan guarantee.

National Park Service Concessions Management Improvement Act of 1998	Pub. L. No. 105-391, § 416, 112 Stat. 3497, 3516 (1998)	Promotes the sale of authentic American Indian, Alaska Native, and Native Hawaiian handicrafts and makes those revenues exempt from franchise fees.
Health Professions Education Partnerships Act of 1998	Pub. L. No. 105-392, sec. 101, § 736, 112 Stat. 3524, 3525 (1998)	Authorizes grants to assist schools with health professions education programs for Native Hawaiians, American Indians, Alaska Natives, and under-represented minorities.

APPENDIX B

Table of State Indian Affairs Organizations and State Recognized Tribes

State Indian Affairs Organization	Authorized/Created	State Recognized Tribe(s)
Alabama Indian Affairs Commission	ALA. CODE §§ 41-9-708 - 41-9-717 (1998)	-Cherokee of Northeast Alabama -Cherokee of Southeast Alabama -Echota Cherokee -MaChis Lower Creek Tribe -Mowa Band of Choctaw Indians -Star Clan of Muscogee Creek
Arizona Comm'n on Indian Affairs	ARIZ. REV. STAT. ANN. § 41-541 (West 1998)	

California Native American Heritage Commission duties limited to burial and repatriation issues	CAL. PUB. RES. CODE § 5097.91 (West 1998)	
Colorado Comm'n of Indian Affairs	COLO. REV. STAT. ANN. § 24-44-102 (West 1998)	
Connecticut Indian Affairs Council	CONN. GEN. STAT. ANN. § 47-59b (West 1998)	-Golden Hill Paugussett Tribe -Paucatuck Eastern Pequot Tribe -Schaghticoke Tribe
Delaware		-Nanticoke Tribe
Florida Governor's Council on Indian Affairs	Executive order	-Florida Tribe of Eastern Creek

State Indian Affairs Organization	Authorized/Created	State Recognized Tribe(s)
Georgia Council on American Indian Concerns (duties limited to burial/repatriation matters)	GA. CODE ANN. § 44-12-280 (1998)	-Cherokee of Georgia Tribal Council -Georgia Tribe of Eastern Cherokees -Tama (lower Muscogee Creek)
(Indiana) Native American Council		
Iowa Office of the Governor in the process of creating a state Indian Affairs office		
Kentucky Native American Heritage Commission	Executive Order 96-272	

Louisiana Governor's Office of Indian Affairs	LA. REV. STAT. ANN. § 46:2301 (West 1998)	-Choctaw-Apache Community of Ebarb -Caddo Tribe -Clifton Choctaw Tribe -Four Winds Cherokee Band -United Houma Nation
(Maine) Indian Tribal-State Comm'n	ME. REV. STAT. ANN. tit. 30, § 6212 (West 1997)	
Maryland Comm'n on Indian Affairs	MD. ANN. CODE art. 41, § 5-401 (1998)	

State Indian Affairs Organization	Authorized/Created	State Recognized Tribe(s)
Massachusetts Comm'n on Indian Affairs	MASS. GEN. LAWS ANN. ch. 6A § 8A (West 1998)	-Mashpee Wampanoag Tribe -Nipmuc Nation (Chaubunagungamaug Band) -Nipmuc Nation (Hassanamisco Band) -Popasset Wampanoag -Seaconke Wampanoag
(Michigan) Comm'n on Indian Affairs	MICH. COMP. LAWS ANN. § 16.711 (West 1994)	-Gun Lake Tribe -Burt Lake of Ottawa/Chippewa -Grand River Band of Ottawa -Swan Creek/Black River of Ojibwe
(Minnesota) Indian Affairs Council	MINN. STAT. ANN. § 3.922 (West 1998)	

Montana Governor's Office of Indian Affairs	MONT. CODE ANN. § 2-15-217 (1997)	-Little Shell Tribe of Chippewa Indians (Metis)
Nebraska Comm'n on Indian Affairs	NEB. REV. STAT. § 81-2501 (1998)	
State of Nevada Indian Commission	NEV. REV. STAT. § 233A.020 (1997)	
New Jersey Dept. Of State Comm'n on American Indian Affairs	N.J. STAT. ANN. § 52:16A-53 (West 1998)	-Nanticoke Lenni-Lenape Indians of New Jersey, Inc. -Powhatan Renape Nation of Rankokus -Ramapough Mountain Peoples
New Mexico Office of Indian Affairs	N.M. STAT. ANN. § 28-12-4 (Michie 1998)	
New York		-Poospatuck Tribe -Shinnecock Tribe

State Indian Affairs Organization	Authorized/Created	State Recognized Tribe(s)
North Carolina Commission of Indian Affairs	N.C. GEN. STAT. § 143B-404 (1998)	-Coharie Tribe -Haliwa Saponi Indian Tribe -Lumbee Tribe -Meherrin Indian Tribe -Waccamaw Siouan Tribe Indians of Person County
North Dakota Indian Affairs Comm'n	N.D. CENT. CODE § 54-36-01 (1997)	
Oklahoma Indian Affairs Commission	OKLA. STAT. ANN. tit. 74, § 1201 (West 1998)	-Yuchi Tribe -Loyal Shawnee Tribe
Oregon Legislative Commission on Indian Services	OR. REV. STAT. § 172.100 (1998)	
Rhode Island Indian Council, Inc.		

(South Dakota) Office of Tribal Governmental Relations	S.D. CODIFIED LAWS § 1-4-1 (Michie 1999)	
Tennessee Commission on Indian Affairs	TENN. CODE ANN. § 4-34-101 (1998)	
Utah Division of Indian Affairs	UTAH CODE ANN. § 9-9-102 (1998)	
Vermont Governor's Advisory Comm'n on Native American Affairs (volunteer advisory committee that meets monthly)	Executive Order 97-90	

State Indian Affairs Organization	Authorized/Created	State Recognized Tribe(s)
Virginia Council on Indian	VA. CODE ANN. § 9-138.1 (Michie 1998)	-Chickahominy Indian Tribe -Eastern Chickahominy Indian Tribe -Mattaponi Indian Tribe -Monacan Indian Tribe (Amherst County Tribe) -Nansemond Indian Tribe -Pamunkey Indian Tribe -Rappahannock Tribe -Upper Mattaponi Tribe
(Washington) Governor's Office of Indian Affairs		
Wyoming Indian Affairs Council	WYO. STAT. ANN. § 9-2-1903 (Michie 1998)	

APPENDIX C

Table of Restoration, Termination, New Recognition and Other Acts

RESTORATION

CITATION	TRIBE(S) RESTORED
Paskenta Band Restoration Act (Title III of "An Act to provide for the annual publication of a list of federally recognized Indian Tribes"), Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C.A. § 479a) (1994)	Paskenta Band of Nomlaki Indians of the Paskenta Rancheria of California
Auburn Indian Restoration Act (Title II of "An Act to provide for the settlement of the water rights claims of the Yavapai-Prescott"), Pub. L. No. 103-434, 108 Stat. 4526 (1994)	United Auburn Indian Community of the Auburn Rancheria of California
Catawba Indian Tribe of South Carolina Land Claims Settlement Act, Pub. L. No. 103-116, 107 Stat. 1118 (codified at 25 U.S.C.A. § 941) (1993)	Catawba Indian Tribe of South Carolina

Ponca Restoration Act, Pub. L. No. 101-484, 104 Stat. 1167 (codified at 25 U.S.C.A. § 983) (1990)	Ponca Tribe of Nebraska
Coquille Restoration Act, Pub. L. No. 101-42, 103 Stat. 91 (codified at 25 U.S.C.A. § 715) (1989)	Coquille Indian Tribe
Ysleta del Sur Pueblo and Alabama and Coushatta Indian Tribes of Texas Restoration Act, Pub. L. No. 100-89, 101 Stat. 666 (codified at 25 U.S.C.A. § 1300g) (1987)	Ysleta del Sur Pueblo of Texas; and Alabama and Coushatta Tribes of Texas
Klamath Indian Tribe Restoration Act, Pub. L. No. 99-398, 100 Stat. § 849 (1986)	Klamath Indian Tribe
Coos, Lower Umpqua, and Siuslaw Restoration Act, Pub. L. No. 98-481, 99 Stat. 2250 (codified at 25 U.S.C.A. § 714) (1984)	Confederated Tribes of Coos, Lower Umpqua and Siuslaw Indians

CITATION	TRIBE(S) RESTORED
Grand Ronde Restoration Act, Pub. L. No. 98-165, 97 Stat. 1064 (codified at 25 U.S.C.A. § 713) (1983)	Confederated Tribes of the Grand Ronde Community of Oregon
Cow Creek Band of Umpqua Tribe of Indians Recognition Act, Pub. L. No. 97-391, 96 Stat. 1960 (codified at 25 U.S.C.A. § 712) (1982)	Cow Creek Band of Umpqua Tribe of Indians
Paiute Indian Tribe of Utah Restoration Act, Pub. L. No. 96-227, 94 Stat. 317 (codified at 25 U.S.C.A. § 761) (1980)	Paiute Indians of Utah (includes Shivwits, Kanosh, Koosharem, Indian Peaks, and Cedar City bands)
Indian Tribal Restoration Act, Pub. L. No. 95-281, 92 Stat. 246 (codified at 25 U.S.C.A. § 861) (1978)	Wyandotte Indian Tribe of Oklahoma, Ottawa Indian Tribe of Oklahoma, Peoria Indian Tribe of Oklahoma, Modoc Indian Tribe of Oklahoma
Siletz Indian Tribe Restoration Act, Pub. L. No. 95-195, 91 Stat. 1415 (codified at 25 U.S.C.A. § 711) (1977)	Confederated Tribes of Siletz Indians of Oregon

Menominee Restoration Act, Pub. L. No. 93-197, 87 Stat. 770 (codified at 25 U.S.C.A. § 903) (1973)	Menominee Indian Tribe

NEW RECOGNITION

CITATION	TRIBE(S) RECOGNIZED
Little Traverse Bay Bands of Odawa Indians and the Little River Band of Ottawa Indians Act, Pub. L. No. 103-324, 108 Stat. 2156 (codified at 25 U.S.C.A. § 1300k) (1994)	Little Traverse Bay Bands of Odawa Indians of Michigan, Little River Band of Ottawa Indians of Michigan
Act of Sept. 21, 1994, Pub. L. No. 103-323, 108 Stat. 2152 (codified at 25 U.S.C.A. § 1300j) (1994)	Pokagon Band of Potawatomi Indians of Michigan
Aroostook Band of Micmacs Settlement Act, Pub. L. No. 102-171, 105 Stat. 1143 (codified at 25 U.S.C.A. § 1721) (1991)	Aroostook Band of Micmac Indians of Maine
Hoopa-Yurok Settlement Act, Pub. L. No. 100-580, 102 Stat. 2924 (codified at 25 U.S.C.A. § 1300i) (1988)	Yurok Tribe of Yurok Reservation (Reconstitution of a recognized tribe, which at the time had no organized government and no membership list, on a new reservation split off from the Hoopa Valley Reservation.)

Lac Vieux Desert Band of Lake Superior Chippewa Indians Act, Pub. L. No. 100-420, 102 Stat. 1577 (codified at 25 U.S.C.A. § 1300h) (1988)	Lac Vieux Desert Band of Lake Superior Chippewa Indians
Texas Band of Kickapoo Act, Pub. L. No. 97-429, 96 Stat. 2269 (codified at 25 U.S.C.A. § 1300b) (1983)	Texas Band of Kickapoo Indians (renamed Kickapoo Traditional Tribe of Texas, 1989)
Mashantucket Pequot Indian Claims Settlement Act, Pub. L. No. 98-134, 97 Stat. 851 (codified at 25 U.S.C.A. § 1751) (1983)	Mashantucket Pequot Tribe
Maine Indian Claims Settlement Act of 1980, Pub. L. No. 96-420, 94 Stat. 1785 (codified at 25 U.S.C.A. § 1721) (1980)	Houlton Band of Maliseet Indians

TERMINATION

CITATION	TRIBE(S) TERMINATED
Act of Aug. 18, 1958, Pub. L. No. 85-671, 72 Stat. 619 (1958) *as amended by* Act of Aug. 11, 1964, Pub. L. No. 88-419, 78 Stat. 390 (1964)	Forty-one rancherias under the California Rancheria Act
Act of Sept. 5, 1962, Pub. L. No. 87-629, 76 Stat. 429 (codified at 25 U.S.C.A. § 971) (1962)	Ponca Tribe of Nebraska
Act of Sept. 21, 1959, Pub. L. No. 86-322, 73 Stat. 592 (1959)	Catawba Tribe of South Carolina (repealed Oct. 27, 1993)
Act of July 10, 1957, Pub. L. No. 85-91, 71 Stat. 283 (1957)	Coyote Valley Rancheria
Act of Mar. 29, 1956, ch. 100, 70 Stat. 58 (1956)	Lower Lake Rancheria in California

Act of Aug. 1, 1956, ch. 843, 70 Stat. 893 (1956)	Wyandotte Tribe of Oklahoma (repealed 1978)
Act of Aug. 2, 1956, ch. 881, 70 Stat. 937 (1956)	Peoria Tribe of Oklahoma (repealed in 1978)
Act of Aug. 3, 1956, ch. 909, 70 Stat. 963 (1956)	Ottawa Tribe of Oklahoma (repealed in 1978)
Act of June 17, 1954, ch. 303, § 1, 68 Stat. 250 (codified at 25 U.S.C.A. § 891) (1954)	Menominee Tribe of Wisconsin (repealed in 1973)
Act of Aug. 13, 1954, ch. 732, § 1, 68 Stat. 718 (codified at 25 U.S.C.A. § 564) (1954)	Klamath Tribe of Oregon (repealed in 1978 with respect to Modoc Tribe)
Act of Aug. 13, 1954, ch. 733, § 1, 68 Stat. 724 (codified at 25 U.S.C.A. § 691) (1954)	Sixty-one tribes and bands in western Oregon (repealed 1977 with respect to the Siletz Tribe)
Act of Aug. 23, 1954, ch. 831, § 1, 68 Stat. 768 (codified at 25 U.S.C.A. § 721) (1954)	Alabama and Coushatta Indians of Texas

CITATION	TRIBE(S) TERMINATED
Act of Aug. 27, 1954, ch. 1009, 68 Stat. 868 (codified at 25 U.S.C.A. § 677 *et seq.*) (1954)	Mixed-blood Utes of the Uintah and Ouray Reservation in Utah
Act of Sept. 1, 1954, ch. 1207, 68 Stat. 1099 (codified at 25 U.S.C.A. § 741) (1954)	Southern Paiutes of Utah (repealed in 1980)

OTHER

CITATION	TRIBE(S)	COMMENT
Tlingit and Haida Status Clarification Act (Title II of "An Act to provide for the annual publication of a list of Federally recognized Indian Tribes"), Pub. L. No. 103-454, 108 Stat. 4791 (codified at 25 U.S.C.A. § 1212) (1994)	Central Council of Tlingit and Haida Indian Tribes of Alaska	Reaffirmation of Federal Recognition
Indian Law Technical Amendments of 1987, Pub. L. No. 100-153, 101 Stat. 886 (codified at 25 U.S.C.A. § 331 nt; 25 U.S.C.A.§ 373; 25 U.S.C.A. 1401; 25 U.S.C.A. 2301) (1987)	Frank's Landing Indian Community	Makes residents of the Community eligible for Federal Indian services but does not create or establish the Community as a Federally-recognized tribe.

APPENDIX D

Excerpts from Proceedings of the 1978 Hawai'i State Constitutional Convention

DEBATES IN THE COMMITTEE OF THE WHOLE ON HAWAIIAN AFFAIRS

September 2, 1978 (pp. 411-26) Hawaiian Home Lands

DELEGATE DE SOTO: . . .

Today over 113,000 acres of [Department of Hawaiian Home Lands ("DHHL")] lands are leased to the public through leases, revocable permits or licenses. Another 16,000 acres are under governor executive orders, this all coming prior to 1972. Another 22,000 acres are utilized by federal, state and county agencies without document, and another 40,000 acres are classified as conservation. In all, 85 percent of DHHL lands (170,000 acres) are utilized by the general public; 12½ percent have actually been utilized by the intended beneficiaries, or 400 acres per annum have been transferred to native Hawaiians since 1920. At that rate, it would take over 400 years to fully dispose of the lands, provided the department could regain those lands utilized by the government and public sector. Mr. Chairman, this is 1978, 130 years after the Great Mahele, and the *maka [ā]inana* are still a landless, drifting nonentity. Through no fault of their own, they have been foreclosed from the breath of life – the *'[ā]ina*.

. . .

DELEGATE ONTAI: . . . As most of you know – but I'll repeat it for emphasis – the Hawaiian homes department and the act were and are the most neglected part of the State of Hawai['i, the most neglected department. It was woefully lacking in funds at its inception, and for the past 50 years and even today, it lacks funds to run the department properly, lacks funds to construct homes and

facilities necessary to service existing and future applicants.

At its inception the act was designed to fail, as most of you know . . . [T]here was no intention of putting all the applicants on the lands. Most of the lands that were given to the Hawaiian homes department were called junk lands. The word *'opala* was used earlier and would aptly describe these lands. In 1920 (approximately), when the act was being discussed in Congress, one congressman in referring to these lands used the words "junk lands" – it's in the congressional record and that is why I use the term. I've seen most of the lands myself – they are junk lands. The land the people are on today, and most of it at the time the people went on it, was junk land. Thank goodness for modern times, with roads, utilities and job markets spread out into the country.

. . .

A funding setup for the Hawaiian homes act in 1920 was made and made for failure. It was doomed to failure; it did not take into account the increasing numbers of applicants coming into the program or the increasing costs of construction. Today funds are absolutely depleted, except using their own funds. They can barely build 50 homes a year. As you all know, there are several hundred new applicants every year. If the Hawaiian homes department were given good lands, no doubt the applicants coming in every year, instead of two or three hundred, probably would double or triple when it was known that good lands were available instead of junk lands way out in the boondocks. It is time to correct the inequities, injustices and, I might say, the deliberate

deceit – or perhaps more of fraud – perpetrated on the Hawaiian in 1920 and for the past 50 years. I feel, and I know most of us feel, it is high time we correct all the injustices, inequities and the fraud and deceit that were played upon the Hawaiian people. This is the time.

DEBATES IN THE COMMITTEE OF THE WHOLE ON HAWAIIAN AFFAIRS
September 2, 1978 (pp. 425-36) **Hawaiian Cultural Education**

DELEGATE DE SOTO: Mr. Chairman and fellow delegates, I rise to speak in favor of the Committee Proposal No. 12. There are five significant sections contained within the proposal. Amendments are made to Articles IX, XIII, XIV and I.

Section I amends Article IX by adding the following, entitled "Hawaiian Education Program. The State shall provide for a comprehensive Hawaiian education program consisting of language, culture and history as part of the regular curriculum of the public schools.["]

"The use of community expertise shall be encouraged as a suitable and essential means in furtherance of Hawaiian language, culture and history."

. . .

Your Committee determined that one ethnic group that may be a rich source for just such a study is the Hawaiian culture, with its emphasis on group responsibility and success, and the *'ohana* extended family system. The Hawaiian culture survived and thrived in environmental harmony on a relatively small land area.

Section 2 of Committee Proposal No. 12 deals with official languages. We propose that "English and Hawaiian shall be the official languages of Hawai['i, except that Hawaiian shall be required for public acts and transactions only as provided by law." Your Committee decided to make this amendment to the Constitution in order to give full recognition and honor to the rich cultural inheritance that Hawaiians have given to all ethnic groups of the State.

The purpose of Committee Proposal No. 12, section 4, is to recognize, reaffirm and protect those traditional and customary rights of native Hawaiians. As native Americans, Hawaiians have inherent and fundamental rights to the free exercise of ancient activities necessary for the purposes of sustenance, culture and religion. These rights are partially reaffirmed by the State Constitution as well as by many state laws. The recognition of traditional native Hawaiian fishing rights outside the public use of certain fisheries is upheld in Article X, Section 3, of our State Constitution. The codification of traditional native Hawaiian access, water and gathering rights for sustenance purposes is found in Section 7-1 of our *Hawai['i Revised Statutes*, originally part of the Kuleana act of 1850.

Despite these laws, the inability of poor Hawaiians to gain access to the courts, the lack of government efforts to protect Hawaiian rights and the judiciary's unwillingness to enforce these rights have resulted in making Hawaiians strangers in their own homeland. Native Hawaiians who practice or wish to follow the ancient ways of their ancestors face more and more "keep out" signs, barbed wire fences, locked gates and government prosecution for trespass. How long are we going to

deprive a people of their culture and heritage? Ignorance, apathy, callousness and neglect are keynotes of this government's interaction with traditional Hawaiian religion and culture. This state of affairs is caused by a common misconception that such Hawaiian use rights somehow do not have any validity in today's society. What are we going to do with the many Hawaiian taro farmers sprinkled throughout the State who are deprived of their water rights because large business entities are diverting water? What are we to do with the many Hawaiians who depend on access to the sea and mountains to feed their families? What are we to say to the Hawaiian children who wish to visit the burial grounds of their *kupuna?* Do we tell them to visit Bishop Museum or see a tourist show if they want to learn about their Hawaiian culture, values and identity? Or are we going to allow them to become part of their culture?

Mr. Chairman, in ancient Hawai[ʻ]i an individual did not own land or water; there was no such thing as private ownership. Hawaiian society was based on the welfare of the community and a sharing of the water and its products. Under the ancient value system of *aloha ʻāina*, Hawaiians respected the land and practiced conservation of natural resources. They respected each other's property rights; they did not arbitrarily invade another person's cultivated area if they wanted some taro or bananas.

Committee Proposal No. 12, section 4, does not attempt to grant unregulated, abusive and general rights to native Hawaiians and only native Hawaiians; rather, it allows tenants of an *ahupua ʻa* – and not all native Hawaiians – access rights to the mountains and sea, as was traditionally and customarily asserted by their ancestors.

This is very important since the large landowners – basically 10 to 12 corporations and estates which own almost 90 percent of all private lands – have intruded upon, interfered with and refused to recognize such rights. Sustenance, religious and cultural practices of native Hawaiians are an integral part of their culture, tradition, and heritage, with such practices forming the basis of the Hawaiian identity and value systems.

. . .

If the delegates to this Convention sincerely wish to preserve the small remaining vestiges of a rapidly disappearing culture, the solution is to provide the recognition and reaffirmation of native Hawaiian rights by constitutional amendment. I strongly recommend passage of this proposal because such action would help to perpetuate a heritage that is unique and an integral part of our State.

. . .

DELEGATE NOZAKI: I rise to speak in favor of section 1, entitled "Hawaiian Education Program." It is time to recognize the fact that Hawaiian values are as important as other values in our multicultural State, and that these values should be given equal consideration and recognition. We cannot deny the reality that Hawaiian values do influence us in all phases of our life, whether we realize it or not.

It is time to wipe out the alienation of the Hawaiian people in the schools. Of most importance is the blossoming of the Hawaiian renaissance which we are experiencing at this very moment. The time is right for change.

How do we begin to change? We must start with education. The State should provide for a comprehensive Hawaiian education program. The State must mandate the provision for Hawaiian studies for two main reasons. First, it will guarantee a meaningful program – not the piecemeal kind of program that now exists. What we have now in the schools is fragmented and not even an introduction to Hawaiian culture – that's how sketchy it is. Secondly, if it is mandated, we can be assured that it will be taught properly.

The committee proposal recommends the inclusion of language, history and culture. These three elements are necessarily tied together. Language is essential to gain insight into the feel of the culture; through language we realize the innuendos and beauty of a culture. By studying his own ethnic history, the Hawaiian student becomes politically aware and develops into an effective citizen. By studying his own culture, he becomes socially aware and develops individual pride, identity and self-realization. There are also benefits to the community and the schools. Hawaiiana stresses cooperative rather than competitive behavior. Other students benefit through understanding the background of the Hawaiians. All students will learn that there are not just differences between Hawaiians and others, but that there are many things they all have in common. Through these kinds of developments, we can look forward to a decrease in alienation in the community. And all this can be the result of providing for a comprehensive Hawaiian education program in the schools.

It is the duty and responsibility of this State to preserve all aspects of Hawaiiana in education, for it is this State which is the home of the Hawaiian people.

. . .

DELEGATE STERLING: . . . I'd like to speak in favor of the section of the committee proposal on Hawaiian education. The main thrust of this section is toward things of value – the sophisticated, proven culture that sustained thousands and thousands of people in a very healthy manner prior to contact with Western civilization: a culture that allowed navigation of thousands of miles of open sea long before the Vikings faced the open sea; a calendar that considered the subtle differences between a normal calendar year, the tropic year and the sidereal year as we know it, the leap year; an advanced system of irrigation; and advance knowledge of astronomy. These are just a few points of this very sophisticated culture that existed in Hawai[ʻ]i prior to contact with the Western world. This is their heritage, as one of the previous speakers said, that we leave to our children.

. . .

DELEGATE KAAPU: . . .

I was fortunate to have grown up in that surrounding as I got to appreciate the feel of living in a grass house, working in taro patches, doing all these things. My father wore a *malo* – he was quite a sight to behold, but the Hawaiians in the area viewed him with mixed feelings. Some were ashamed to see him naked like that; from the teachings in school and from the attitudes that were

conveyed to them by those who controlled the educational system, they felt that this was somehow something to be ashamed of and they regarded him askance. And yet there were many from the mainland and other parts of the world – celebrities like President Roosevelt – who made it a point to drop in and visit him and see the way he lived, because they felt that it had great value. And for that reason, some of the Hawaiians in the area felt there must be something to it, so they were ambivalent, they had differing feelings: he was a celebrity, yet at the same time he did things they were taught to be ashamed of. Schoolchildren came in great numbers to see how the old Hawaiians lived; they watched him pound poi, they watched him eat raw fish, they were shown all these things because this was the only opportunity they had to learn. So they came from all over the State, and all over the world for that matter.

However, I was not privileged to learn the Hawaiian language because, although I learned to live in the old way, it was not offered in the schools I went to. Nor were there courses adequate to teach me things I had to learn, very fortunately, from my own experience. Now, many years later I see with great happiness the spread of awareness, that the opportunities are even greater. And yet my son – who just left for Harvard a few days ago, having worked here in the Con Con for several weeks – was only learning Hawaiian as he got aboard the plane. He took his language book with him, and he's trying to master the phrases contained therein, although at his school (a public school) he had already had seven years of Japanese and could read, write and speak it.

So while I could not discourage the efforts that have been made to this point, I think this proposal and this section in this Constitution, which would give encouragement to this, would be appropriate . . . But I also support it for another reason: to come to know a culture is to come to appreciate it, and to appreciate a culture is to respect it. And those who respect it will not destroy it. And to come to know this land and the traditions associated with the land in the early ages and in the schools, in a curriculum and in a course that is given the dignity of being regarded as one of the most important by its recognition within the Constitution, I think will convey to our young people the kind of appreciation and respect – not only for the land but for the culture derived from that land, and for the people, and for the language and customs that they developed. And for that reason also, I support this. Because those who study the Constitution and find in it an indication of the importance we place upon the Hawaiian culture and language, and who gain this opportunity in the schools, will come to know the Hawaiian culture, the Hawaiian feeling, the Hawaiian spirit and our land, and they will therefore preserve it and not destroy it.

. . .

DELEGATE HOE: . . . I feel that continuing displacement and more and more pressures against the native Hawaiian's rights make it just and proper that the State at this time reaffirm and vow to protect the rights of the native Hawaiian, as this proposal states. If we are to assure the future of the Hawaiian culture, which all of us recognize as a basic and essential part of our State for all residents, and if we acknowledge that Hawai[ʻ]i is the

only land where the Hawaiian culture can exist, it is paramount that we endorse this legal action to protect the traditional and customary rights of native Hawaiians.

. . .

All rights must function in relation to all others. What this proposal does – and what we must do by supporting it – is to protect those rights which today are being threatened and slowly eroded – the rights of native Hawaiians for subsistence, cultural and religious purposes.

. . .

DELEGATE DE SOTO: . . .

These customary and traditional rights are slowly being extinguished. Fences and roads are going up so we no longer have access to the ocean in many areas. Large landowners who own an entire section of an island shut out the public and the native Hawaiian from the beaches, which are public property. In going through the outer islands receiving testimony, we have received – and you, Mr. Chairman, heard the testimony, when many native Hawaiians stood before this committee and cried – grown men, grown women – declaring to this committee and its members that their right of access to the beach had been infringed upon; where, indeed, their family for generations had practiced going to the ocean for their subsistence and sustenance, was now blocked off by large landowners.

Their appeal, their cry to this Committee on Hawaiian Affairs was to help them do something about this. The one point in particular that stands out vividly in my

mind is of a man who said, with tears rolling down his face, that he cannot get to the area where his family had fished for generations, and on a pension of $276 a month is now forced to buy his fish. Consequently, fish is no longer in his diet.

DEBATES IN THE COMMITTEE OF THE WHOLE ON HAWAIIAN AFFAIRS
September 2, 1978 (pp. 457-60) Office of Hawaiian Affairs

DELEGATE DE SOTO: . . .

The primary purpose of proposal 13 is to grant to Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare. Proposal 13 amends Article XI of the Constitution of the State of Hawai[']i by including in Article XI that portion of the trust created by Section 5(f) of the Admission Act for the benefit of native Hawaiians. It establishes the Office of Hawaiian Affairs and an elected board of trustees to administer the trust created for the benefit of all Hawaiians. The board of trustees is granted the authority to formulate policy relating to the affairs of all Hawaiians. It unites Hawaiians as a people and allows Hawaiians to affirmatively better their condition by giving them the opportunity to assume the trust obligation imposed on the State by Section 5(f) of the Admission Act and to discharge the trust obligation by careful assessment and planning for the future welfare of all Hawaiians. The goal of the Office of Hawaiian Affairs is to address the modern-day problems of Hawaiians which

are rooted in as dark and sad history as will ever mark the annals of time.

Before the advent of the foreigner, the Hawaiians had succeeded in developing a culture that was truly remarkable. They took from the *'[ā]ina* and from the sea for sustenance. In the words of Ralph S. Kuykendall, one of the most thorough of the historians of Hawai['i, Hawaiians were "a healthy, robust, intelligent, and good tempered folk" who lived religiously, arduously and intelligently.

As evidenced by the feats of the *Hokule'a*, the pre-Captain Cook Hawaiians were great sailors, traveling long distances in canoes. They were great navigators, with an almost mystic knowledge of the stars. They were great fishermen. They were great farmers and engineers. In the raising of taro, the Hawaiians perfected a technique of building irrigation ditches, a feat requiring no little industry and ingenuity, which has never been improved on. They were great doctors, skilled in the use of herbs. They were a great and proud people.

The land system before the coming of the foreigner was inseparably a part of religion and government. To destroy one was to destroy the other. The Hawaiians worshiped nature, which expressed itself in a system of rules – *kapus* – that regulated their daily lives. The islands were divided into kingdoms, each ruled by a king. In land matters, as in many others, the king's words were supreme. Part of the land the king reserved for himself for his own private use; the rest he portioned out to his

subordinates, who in turn portioned it out to their subordinates, all the way down to the *hoa 'ā[ina*, who tilled the soil.

In the life the Hawaiians lived before the foreigners, there was no future orientation. The gods were immediate to the common people and so were the kings; they gave directly and took away directly. Tomorrows were only a succession of todays. This was, thought the Hawaiian, as it should be; it was all he knew. If you took away his religion, his government, if you took him away from the *'[ā]ina* or from the economy that he knew, you destroyed him. And many people did do this.

With the first real influx of foreign invaders near the end of the 18th century, the change from the Hawaiian subsistence economy – and with it the whole cultural structure – to an exchange economy began at an astonishingly accelerated speed. Mr. Chairman, by 1820, when the first missionaries arrived, Kamehameha II had formally abolished the *kapu* system, thus knocking the props from under the old system of religion. The fur trade, the sandalwood trade, the whaling trade, and their accompanying influences had already infected the native culture and had neglected to provide any healing power.

The new ideas and practices, incomprehensible to the Hawaiians yet powered irresistibly by the superior prestige and force of the invaders, broke the force of the old *kapu* system. It also weakened the tie between the commoners and the chiefs, who had been their leaders from time immemorial.

By 1840, native morale had all but been destroyed. The new ways may have been superior, but to Hawaiians

this was little compensation for the destruction of the old and the familiar. Thousands of Hawaiians died. From the missionary estimate in 1826 to the official Hawaiian census in 1919, the number of full-blooded Hawaiians had decreased from 142,650 to 22,500, while the Hawaiian death rate had correspondingly increased until it exceeded considerably the death rate of any other race inhabiting the Islands at that time.

Mr. Chairman, the Hawaiian had become hopelessly land-less. All the stories that have been told with respect to the Great Mahele and that divisioning of land – finally the inevitable happened: our *mo'i wahine* Queen Lili'u'okalani was dethroned – a bloodless revolution but a queen deposed, a legitimate monarchy overthrown. Many, many injustices have been documented in our history. All these injustices have caused us now to stand in public and bare our souls once more, bare our souls so that someone, someplace will begin to listen.

Mr. Chairman, fellow delegates, if there must be a statement of need before Committee Proposal No. 13 is accepted or adopted by this Convention, then surely the following statistics indicate it: according to the 1975 census updates, the present Hawaiian population is a young one; there are roughly 60,000 Hawaiians, or approximately 54 percent of the total Hawaiian population, who are under the age of 20. It is my dream and the dream of my people that the Hawaiian today be given the opportunity to provide for betterment of the condition and well-being of these young Hawaiians, to address the contemporary problems which Hawaiians face – of crime; inadequate housing conditions, welfare rolls, education. Committee Proposal No. 13, Mr. Chairman, I submit,

attempts to build the steps for native Hawaiian people so that they may realize, or at least decide some point in, self-determination.

All kinds of people have helped us in the planning. Your Committee on Hawaiian Affairs begs this Convention to consider, and submits that this native Hawaiian office is essential for the protection and the preservation of the Hawaiian race. I ask all of you to consider this and adopt this proposal. Mahalo.

. . .

DELEGATE KAAPU: . . . The proposal of a Hawaiian trust is analogous to creating an entity like that of the University of Hawai[']i, which has the power to hold and own property, to create and administer programs and to govern itself under certain general laws of the State as well as the Constitution.

Its need is not in order to bring about immediately . . . any new benefits to Hawaiians, but to do as the Constitution ought, which is to set the framework by which resources can be managed and benefits achieved through setting the frame by which those who are to receive and enjoy these benefits might in some democratic manner govern the disposition of these resources and settle on policies among themselves through the process of election and through the process of scrutiny by those to whom they are responsible. That . . . is what the proposal for a Hawaiian trust creates.

. . .

It allows for an umbrella organization which could someday embrace the Hawaiian homes commission, all of

the Hawaiian home lands department and all the functions. It also provides a receptacle for the possible receipt and administration of any reparations that might be coming in the future.

The board of trustees is created as the governing body. It's to be made up of beneficiaries who are native Hawaiians themselves under the broader definition of that meaning.

. . .

But it does have the added benefit of allowing those who are direct beneficiaries to set their own policies and govern their own affairs through a democratic process.

. . .

DELEGATE PETERSON: . . . I think it's time that native Hawaiians have more impact on their own future, and the transfer to Hawaiians of the responsibilities of self-government is only right and proper.

. . .

DELEGATE BARR: . . .

It seems to be clear that it was the intent of the Admission Act that we recognize a special claim, a special interest on the part of an aboriginal people in these Islands.

. . .

DELEGATE STERLING: . . . The basic interest of Congress, to rehabilitate the Hawaiian people, continues and the errors of the Hawaiian Homes Commission Act, 1920, were rectified by setting up a second trust in the

Admission Act. Rather than attempt to draft a second rehabilitation program, Congress delegated the task to the state legislature.

. . .

But we set this up, as the chairman so beautifully stated, as the receptacle not only to comply with the Admission Act but for any other possible benefits that may be coming to the Hawaiian people.

STANDING COMMITTEE – REPORT NO. 59
(pp. 643-47) Office of Hawaiian Affairs

In looking to the future, your Committee decided that it is of utmost importance to establish a trust entity that would be for all individuals whose ancestors were natives of the area which consisted of the Hawaiian Islands prior to 1778, the date that marks the arrival of Captain Cook to these shores . . . Your Committee determined that the time was ripe to establish a trust entity with an elected board of trustees that would control and manage the assets and inheritance, and financial assistance belonging to all native Hawaiians, and to formulate policy relating to their affairs.

. . .

Although your Committee was tempted to change this outmoded rule from the 1920s, your Committee concluded that this responsibility should be assumed by the Office of Hawaiian Affairs.

The Admission Act does not specify what percentage of the trust shall be allocated to native Hawaiians of one-

half blood. The committee members felt that the proportion should rightfully be based either on equal division or at least on a percentage of the five purposes.

. . .

As a result of the revolution on January 17, 1893, the crown lands, which belonged to the Hawaiian people, were ceded by the Republic of Hawai[']i to the United States. These lands were conveyed back to the State on Hawai[']i's admission to the Union pursuant to Section 5(b) of the Admission Act. Section 5(f) of the Admission Act created a trust of these public lands separate and apart from the lands defined as "available lands," by Section 203 of the [Hawaiian Homes Commission Act], 1920, as amended. Your Committee found that the Section 5(f) trust created two types of beneficiaries and several trust purposes one of which is native Hawaiians of one-half blood.

Article XI is amended by adding a new section to read:

"OFFICE OF HAWAIIAN AFFAIRS;
ESTABLISHMENT OF BOARD OF TRUSTEES

"Section 5. There is hereby established an Office of Hawaiian Affairs. The Office of Hawaiian Affairs shall hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians. There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are native Hawaiians, in accordance with law. The board members shall be native Hawaiians. There shall be not less than 9 members of the board of trustees; provided that each of the following

islands have at least one representative: O[']ahu, Kaua[']i, Maui, Moloka[']i and Hawai[']i. The board shall select a chairman from its members."

Your Committee added this new Section 5 relating to the Office of Hawaiian Affairs and the establishment of an elected board of trustees in order to provide a receptacle for any funds, land or other resources earmarked for or belonging to native Hawaiians, and to create a body that could formulate policy relating to all native Hawaiians and make decisions on the allocation of those assets belonging to native Hawaiians. Moreover, in looking to the future the office will be able to receive and administer any reparations money, which will probably be awarded to all native Hawaiians regardless of blood quantum.

Your Committee is unanimously and strongly of the opinion that people to whom assets belong should have control over them . . . [Y]our committee concluded that a board of trustees chosen from among those who are interested parties would be the best way to insure proper management and adherence to the needed fiduciary principles . . . The election of the board will enhance representative governance and decision-making accountability and, as a result, strengthen the fiduciary relationship between the board member, as trustee, and the native Hawaiian, as beneficiary.

. . .

The committee intends that the Office of Hawaiian Affairs will be independent from the executive branch and all other branches of government although it will assume the status of a state agency . . . The committee felt that it was important to arrange a method whereby the

assets of Hawaiians could be kept separate from the rest of the state treasury. The committee learned that in the past there has been commingling of funds intended for native Hawaiians of one-half blood with other moneys in the state treasury. The committee felt it imperative that this practice stop.

Article XI is amended by adding a new section to read:

"POWERS OF BOARD OF TRUSTEES

"Section 6. The board shall exercise power in accordance with law, to manage and administer the proceeds from the sale or other disposition of the lands, natural resources, minerals, and income derived from whatever sources for native Hawaiians, including all income and proceeds from that pro rata portion of the trust referred to in Section 4 for those native Hawaiians as defined in the Hawaiian Homes Commission Act, 1920, as amended or may be amended; formulate policy relating to affairs of native Hawaiians, and exercise control over real and personal property set aside by state, federal, or private sources and transferred to said Board for Native Hawaiians.["]

Your Committee decided to grant native Hawaiians the right to determine the priorities which will effectuate the betterment of their condition and welfare by granting to the board of trustees powers to "formulate policy relating to affairs of native Hawaiians[ ]" . . . applicable to the nature and purposes of a trust entity for native peoples.

. . .

The committee intends this section to be broad enough to include within its scope the administration and

management of the native Hawaiian land trust created by the Hawaiian Homes Commission Act of 1920.

. . .

Pursuant to Section 6, the board of trustees could assume the trust responsibilities of the Hawaiian homes commission.

. . .

The consolidation of the two trusts under the control and management of a single board would facilitate the attainment of the objective of the trusts: to provide for the betterment of the conditions of native Hawaiians.

. . .

Your Committee concluded that these Sections 5 and 6, taken together, are of utmost importance for they provide for accountability, self-determination, methods of self-sufficiency through assets and a land base, and the unification of all native Hawaiian people.

Unlike the Act and the Section 5(f) trust, this trust is established for the benefit of all native Hawaiians, including those defined as native Hawaiians under the Hawaiian Homes Commission Act, 1920, as amended, and the restoration of their culture. The committee recognizes the right of native Hawaiians to govern themselves and their assets by their assumption of the trust responsibility imposed on the State to better their condition.

. . .

"The term 'native Hawaiian' means any descendant of not less than one-half part of the blood of the races

inhabiting the Hawaiian Islands previous to 1778." Native Hawaiians of one-half blood will not be a subgroup under this definition. The committee believes that the time has come to include all native Hawaiians, regardless of blood quantum, for the number of descendants is increasing. This qualification has proved to be a factor in dividing the Hawaiian community – mothers and fathers from their children, cousins from cousins, friends from friends. Moreover, the removal of a blood qualification will be in line with the current policy of the federal government to extend benefits for Hawaiians to all Hawaiians regardless of blood quantum.

APPENDIX E

STATEMENT
OF
UNITED STATES SENATOR DANIEL K. INOUYE

The *amicus curiae* brief is a legal document that should be devoid of non-legal matters. However, I believe that to understand the special status that Native Hawaiians have in our State and in our nation, one must consider the history of our islands. In ancient times, the native people of Hawai'i were the only people populating our insular lands. When others began to migrate to Hawai'i, they found a highly sophisticated society with advanced forms of technology for that time and an understanding of astronomical principles by the native people that explained their ability to navigate the far reaches of the Pacific, long before Columbus got lost on his way to India. They found a culture that was rich in dance (*hula*) and chants that conveyed the history of the people. They found a people whose cultural mores were based upon a respect for all living things. Life was an inseparable part of the land and the water, and like other native people of America, Native Hawaiians were the first environmentalists and conservationists in Hawai'i.

Thus, long before the United States decided it had a strategic interest in Hawai'i and long before the Federal government took an interest in the deteriorating conditions of the native people of Hawai'i, Native Hawaiians ruled our islands and had an effective system of governance in place. It was their culture and their history which informed all aspects of life. Those who later came to our shores understood this and so they built their lives in and around the society that had been shaped and given expression by the native people.

Even today, there is little in Hawai'i that does not bear the imprimatur of Native Hawaiiana. By law, the Native Hawaiian language is one of the two official languages of the State. By law, the streets have Native Hawaiian names. The state motto, *Ua Mau ke ea o ka'āina i ka pono* (the life of the land is perpetuated in righteousness), is Native Hawaiian. We officially celebrate *Aloha* Week, the birthday of the first king, King Kamehameha, and the birthday of our first Native Hawaiian representative in Congress, Prince Jonah Kūhīo Kalaniana'ole. *"Aloha"* and the spirit of this word has become part of our way of life. To some it may sound like a tourist phrase, but for most of us in Hawai'i, *aloha* is something real – the spirit of understanding, the spirit of tolerance, the spirit of love.

It is true that wave after wave of immigrants to Hawai'i's shores later effected the displacement of Native Hawaiians in their own homeland, the decimation of their numbers from diseases for which they had no immunities, and the shocking statistics which today bear witness to a people dispossessed of their land, their language, and their culture. It was this contemporary reality that informed the debates of the delegates to the State's 1978 constitutional convention. They observed that the circumstances of the native people were dire, that the Native Hawaiian culture and language were being lost, and that the traditional ways and subsistence lifestyle of the native people were being foreclosed. The delegates recognized that Native Hawaiians needed the means to regain a measure of control over their lives – self-determination.

Throughout the convention debates, the provisions of the U.S. Constitution were taken into consideration and were constantly kept in mind. There was never an intent to abrogate those provisions. Rather, the amendments to the State constitution proposed by the delegates reflect an honest and sincere attempt on the part of the people of Hawai'i to rectify the wrongs of the past, and to put into being the mandate our Federal government – the betterment of the conditions of Native Hawaiians.

The actions taken by the constitutional convention delegates and later the citizens of Hawai'i were very simply measures to assure the survival of a people. The proceedings of the convention make clear that these actions were undertaken in furtherance of the authority delegated to the State of Hawai'i in the 1959 Admission Act. But in all likelihood, given the history of our State and the importance of the native people to the fabric of our society, the citizens of Hawai'i would have adopted the amendments to the State constitution affecting Native Hawaiians even if the Federal authority had not been delegated to the State. Because they knew, as we know today, that without the Hawaiians, there would be no Hawai'i.

I pray that the Honored Justices would take this non-legal aspect of the relationship between the native people of Hawai'i and the State of Hawai'i into consideration as they ponder the arguments offered by the many who have considered this matter of sufficient importance to submit their *amicus curiae* briefs. Most respectfully, I bid you *aloha*.

STATEMENT OF UNITED STATES SENATOR DANIEL K. AKAKA

The essence of Hawai'i is captured not by the physical beauty of its islands, but by the beauty of its people and their willingness to welcome others into their society in order to share their culture, environment and lives. This attitude, often referred to as the "*Aloha* spirit," originates from the culture and traditions of Hawai'i. It is one of the many attributes that contribute to the uniqueness of the State of Hawai'i. I'd like to share with you my views about the essence of Hawai'i and why the people of Hawai'i voted in 1978 to empower the indigenous people, the Native Hawaiians, to establish the Office of Hawaiian Affairs as a means with which to address the betterment of the conditions of the Native Hawaiians.

Hawaii's state motto, *Ua mau ke'ea'o ka'āina'i ka pono*, "the life of the land is perpetuated in righteousness," captures the culture of Native Hawaiians. Prior to western contact, the Native Hawaiians lived in an advanced society that was steeped in science. The Native Hawaiians honored their *'āina* (land) and environment, and therefore developed methods of irrigation, agriculture, aquaculture, navigation, medicine, fishing and other forms of subsistence whereby the land and sea were efficiently used without waste or damage. Respect for the environment and for others formed the basis of their culture and tradition.

For this reason, unlike a number of other aboriginal peoples, the Native Hawaiians welcomed foreigners into their society. Over time, this generous attitude decimated

the indigenous population and almost destroyed the precious traditions and culture of ancient Hawai'i. Hawai'i's monarchy was overthrown, and a provisional government was established which proclaims Hawai'i a republic and transferred vast amounts of land to the United States. The perpetuation of Hawai'i's important cultural traditions were discouraged by leaders convinced of their primacy and committed exclusively to the propagation of Western values and conventions. Despite these events, the remaining Native Hawaiians continued to share their culture and tradition with non-Native Hawaiians and continued to include them into their society.

The fact that the entire State of Hawai'i voted to amend the State Constitution in 1978 to establish the Office of Hawaiian Affairs is significant because it illustrates the recognition of the importance of Hawaiian culture and traditions as the foundation for the *Aloha* spirit. The vote recognized the need to preserve Hawaiian values, culture and tradition. Whereas parts of Native Hawaiian culture and traditions were disparaged, the recognition of their importance has led to a renaissance of the language and culture resulting in an increase in the number of students who are now fluent in the Hawaiian language and who have adopted and adapted ancient Hawaiian traditions. This has been evident in areas such as agriculture and aquaculture, where traditional practices have proven to be environmentally and economically sound and useful in current applications. This recognition has not divided the State, but instead has enriched Hawai'i's society. The true significance of the vote is the fact that the entire state recognized the generosity and hospitality of the Native Hawaiians, the need to

preserve their customs and traditions, and the shared responsibility of Hawai'i's people to acknowledge and redress past injustices.

Hawai'i is truly unique. Since first contact by Captain Cook in 1778 – a period which parallels the history of our Nation – Hawai'i has had at least seven different forms of government: societies ruled by chiefs, monarchy, provisional government, republic, territory, martial law and state. The people of Hawai'i take pride not only in their unique history, but also in each other and in the perpetuation of the *Aloha* spirit as an embodiment of Native Hawaiian traditions and culture.

Indeed, the "Spirit of *Aloha*" has endured and flourished in spite of pestilence, political upheaval and poverty. It transcends political and geographic demarcations and remains the noblest legacy of the Native Hawaiian people to their American brethren and the world.

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OF THE

United States

OCTOBER TERM, 1998

HAROLD F. RICE,
Petitioner,
vs.
BENJAMIN J. CAYETANO,
Governor of the State of Hawaii,
Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF OF *AMICI CURIAE* ALASKA FEDERATION OF NATIVES AND COOK INLET REGION, INC. IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI

Amici Curiae, the Alaska Federation of Natives ("AFN") and Cook Inlet Region, Inc. ("CIRI") represent tens of thousands of Alaska Natives — the aboriginal peoples who crossed the Bering Strait and settled Alaska between 15,000 and 3,000 years ago. AFN is a statewide, non-profit organization representing 90,000 Alaska Natives on issues important to the Alaska Native community. AFN is comprised of representatives of each of the twelve Alaska regional corporations established under the Alaska Native Claims Settlement Act of 1971 ("ANCSA") as well as representatives from regional non-profit associations and rural Alaska Native villages. CIRI is the ANCSA regional corporation for the area around Cook Inlet, discovered by Captain James Cook in 1778. CIRI is owned by roughly 7,000 Native shareholders of Athabascan, Eskimo and Aleut descent. CIRI provides health, housing, and employment services and income to many of its shareholders.[1]

SUMMARY OF ARGUMENT

The unique native peoples of Alaska have been recognized as "Indian" "Tribes" for four hundred years. The Founders' understanding of the "Eskimaux" as Indian Tribes, and Congress' recognition of its power over Alaska Natives ever since the passage of the Fourteenth Amendment and the acquisition of the Alaskan territory, help illuminate Congress' power over, and responsibility for, all Native American peoples.

The treatment of Alaskan Eskimos is particularly instructive because the Eskimo peoples are linguistically, culturally, and ancestrally distinct from other American "Indians." Many modern scholars do not use the word "Indian" to describe Eskimos or the word "tribe" to describe their nomadic family

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[1] No counsel for a party authored any part of this brief; no one other than *amici* or their counsel made a monetary contribution to its preparation or submission. Supreme Court Rule 37.6. All parties consented to the filing of this brief in letters on file with the Clerk of this Court. *Id.* 37.3(a).

groups and villages. The Framers, however, recognized no such technical distinctions. In the common understanding of the time, Eskimos, like Hawaiian Natives, were aboriginal peoples; they were therefore "Indians." Their separate communities of kind and kin were "Tribes." Congress' special power over these aboriginal peoples is conceded by Petitioner and is beyond serious challenge. This brief uses the unique perspective and historical experience of the Arctic peoples of Alaska to illuminate three historical propositions:

1. During the Founding Era, and during the Constitutional Convention, the terms "Indian" and "Tribe" were used to encompass the tremendous diversity of aboriginal peoples of the New World and the wide range of their social and political organizations. The Founding generation knew and dealt with Indian Tribes living in small, familial clans and in large, confederated empires. Native Alaska villages and Native Hawaiians residing in their aboriginal lands (*i.e.*, the small islands that comprise the State of Hawai`i) are "Indian Tribes" as that phrase was used by the Founders.

2. The Framers drafted the Constitution not to limit Congress' power over Indians, but to make clear the supremacy of Congress' power over Indian affairs.

3. Congress has retained the power to promote the welfare of all Native American peoples, and to foster the ever-evolving means and methods of Native American self-governance.

This history is accurately reflected in two centuries of this Court's jurisprudence. Starting with Chief Justice Marshall, this Court has recognized the power of the United States to provide for the welfare, and to promote the self-governance, of Indian peoples. With Congress' permission and support, Native American peoples have long selected their own leaders. This right is part of the structure of America's complex experiment in multi-sovereign governance. Petitioner, a citizen of Hawai`i and *not* a Native Hawaiian, has no more "right" to vote in the quasi-sovereign government structures of Native American peoples than he does to vote in the state elections of New York.

I. FRAMING THE CONSTITUTION

A. The Contemporaneous Understanding of "Indian"

Petitioner apparently contends that Native Hawaiians are not "Indian Tribes" because they lived in a "Kingdom" ruled by a "King" — a Kingdom overthrown by Western businessmen and American officials in 1893. Whatever the merits of this view of "Indian Tribes" in modern ethnographic terms, Petitioner's understanding of the Constitution is wildly anachronistic. In the language and understanding of the Founders, "tribes" or "peoples" did not lose their identity as such when conquered or ruled by kings. Like other Native American peoples, Hawaiian Natives lived for thousands of years as "tribes," then as confederations of tribes, now as conquered tribes.

1. The Founders Used "Indians" to Refer to the Aboriginal Peoples of the "New Founde Lands"

All aboriginal peoples of the New World were "Indians." That is what it meant to be an "Indian." The Founders knew that Columbus had not landed in India or the Indies; Columbus's navigational error had been corrected, but his malaprop had survived. And so, in the words of one of the earliest English books about America, the native peoples were "Indians," for the simple reason that "*so caule wee all nations of the new founde lands.*"[2]

Roger Williams made the same point in *A Key Into the Language of America* (1643). Williams understood that the English terms for the aboriginal peoples, "Natives, Savages, Indians, Wild-men . . . , Abergeny men, Pagans, Barbarians, Heathen," were the white-man's concepts, not the names that the natives "give themselves":

They have often asked mee, why we call them *Indians*,

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[2] Gonzalo Fernández de Oviego y Valdéz, *De la natural hystoria de las Indias* (1526), *trans. by* R. Eden (1555), in E. Arber, ed., *The First Three English Books on America* (Birmingham, Eng., 1885) (emphasis added).

> *Natives*, &c. And understanding the reason, they will call themselves *Indians*, in opposition to *English*, &c.[3]

Indians were defined by contrast. Indians were *the other*— *non*-English, *non*-Europeans, *un*civilized, *un*believers—the "savages" the Europeans "discovered" in the "new founde lands."

2. The Founders Knew that the "Indian" Peoples Were Politically and Ethnically Diverse

The earliest explorers of the New World encountered an extraordinary diversity of aboriginal peoples—from the elaborate Aztec and Inca civilizations of the South to the nomadic "Esquimaux" of the North. These early experiences and the contemporary fascination with these diverse cultures informed the concept of "Indians" in the colonial era.

The accounts of Hernan Cortes and Bernal Diaz portrayed the "Indians" of the New World living in villages and towns, building stone temples and paying gold tribute to conquering tribes led by Montezuma.[4] The English came to North America looking for gold, and seeking to displace their Spanish competitors, inspired in part by the Spanish experience.

During the same era, starting with John Cabot's 1497 voyage, repeated quests for the "Northwest passage" from the Atlantic to the Orient brought wave after wave of Englishmen into contact with the "Esquimaux Indians" from Greenland to Alaska. In 1578, an English explorer captured several Eskimo, including a "strange man and his bote" (a kayak), off of Baffin

[3] *Quoted in* Robert F. Berkhofer, Jr., *The White Man's Indian* (1979), 15.

[4] Early explorers understood that Montezuma's Aztec "Empire" reflected the ascendancy of some Indian peoples over others. Each Indian village or "people" ("gente") was separately named, had their own "chiefs," and paid "tribute" to or were at war with the Aztec people. *See*, Cortés, *Letters from Mexico* (1519-1526) (Pagden, tr., 1986), 30-36, 50-57, 66-85, 95-97, 109; Diaz, *The Conquest of New Spain* (1568) (Cohen, tr., 1963), 140-88; Fray Diego de Landa, *Relación de las Cosas de Yucatán* (1566), ch. VIII; *see* A.M. Josephy, Jr., *The Indian Heritage of America* (rev. ed., 1991), 212-13.

Island, and brought them to London. The "captive Eskimos . . . quickly became the center of widespread interest."[5] In a contemporary account, the "'strange man and his bote . . . was such a wonder onto the whole city and to the rest of the realm that heard of it as seemed never to have happened the like great matter to any man's knowledge.'"[6] Queen Elizabeth was "so impressed . . . she granted [the Eskimo] permission to hunt swans on the Thames," an act for which Englishmen were punished by hanging.[7] An Eskimo paddled a kayak up the Thames before the Pilgrims set foot on Plymouth Rock.

For the next two hundred years, European explorers continued to encounter the "Esquimaux Indians." In his famous 1778 voyage — in which he "discovered" the Hawaiian Islands and encountered the "Indians" there — Captain Cook sailed through the Bering Strait and along the coast of Alaska, discovering Cook Inlet, from which *amicus* Cook Inlet Region, Inc. takes its name. He described encounters with "Esquimaux" "nations" in western America.[8] In 1789, McKenzie explored "Cook's River" and passed among the "Esquimaux *Indians*."[9]

There was no understanding in the founding generation that Indians constituted a distinct or separate race. Indians were

[5] Wendell H. Oswalt, *Eskimos & Explorers* (2d Ed.) (1999), 32.

[6] Michael Lok, "East India by the Northwestw[ard]", in *A True Discourse of the Late Voyages of Discoverie . . . [by] Martin Frobisher* (1578), *reprinted in The Three Voyages of Martin Frobisher* (Hakluyt Society), 87. With such experiences, the imagery of primitive man entered the culture. By 1600, Shakespeare's audience readily understood Othello's sad likening of himself to "the base indian" who "threw a pearl away richer than all his tribe." (V.ii.348-49).

[7] Oswalt, *supra*, at 32.

[8] James Cook, *A Voyage to the Pacific Ocean* (1784), vol. II, bk. IV, ch. IV, pp. 357, 368, 371, 374; *id.* at ch. VI, pp. 391, 400; *id.*, ch. XI, pp. 521-22.

[9] Alexander McKenzie, *Voyages from Montreal* (3rd American ed., 1803) (*quoted in* Oswalt, *supra*, at 65); *see also* Arthur Dobbs, *An Account of the Countries Adjoining Hudson's Bay* (1744), 49 (describing the "Eskimaux Indians"); Henry Illis, *A Voyage to Hudson's-Bay, by the Dobbs Galley and California* (1748) (1967 reprint) (references to "Eskimaux Indians").

often assumed by the European settlers to be peoples like themselves:

> Before the development of modern dating methods that established beyond doubt the great antiquity of early man in America, it was believed that the Indians were offshoots of known civilizations of the Old World. Some scholars argued that they came from Egypt, others that they had broken away from the Chinese, and still others that they were descendants of Phoenician or Greek seamen.... Another belief, more legend than theory, held that various light-skinned tribes possessed the blood of Welshmen who had come to America in the remote past....[10]

Others theorized the Indians were the "lost tribes" of Israel.[11]

In his popular *Notes on the State of Virginia*, Thomas Jefferson accepted the plausibility of the popular notion that the Indians had migrated to America from Europe via "the imperfect navigation of ancient times."[12] Jefferson noted, however, that Cook's voyage through the Bering Strait suggested that all the "Indians of America" except the "Eskimaux" migrated from Asia. Jefferson theorized that the Eskimos had come to

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[10] Josephy, *supra*, at 40.

[11] *Id.* at 40; Letter, Jefferson to Adams, June 11, 1812 (discussing a popular book arguing "all the Indians of America to be descended from the Jews ... and that they all spoke Hebrew"), *in* Jefferson, *Writings* (Library of America, 1984).1261; Diaz, *supra*, at 26 (objects at Indian site attributed "to the Jews who were exiled by Titus and Vespasian and sent overseas").

[12] Jefferson, *Notes on the State of Virginia* (1787), *in* Jefferson, *Writings*, at 226. Jefferson's *Notes* — which had circulated among several of the Founders for years before the Constitutional Convention — were written in 1781, published in February 1787 and appeared in newspapers during the Convention. Barlow to Jefferson, June 15, 1787, in *Papers of Thomas Jefferson* (Boyd, ed.), 11: 473 ("Your Notes on Virginia are getting into the Gazetts in different States"); *see also, e.g.*, *id.* at 8:147, 9:38, 517, 12:136 (Madison's copy); *id.* at 10:464, 15:11 (Rutledge's comments on); *id.* at 8:160, 164 (Adams comments on); *id.* at 8:147, 229, 245 (Monroe's copy); *id.* at 21:392-93 (citations re circulation of *Notes*).

America via Greenland from "the northern parts of the old continent," *i.e.*, Northern Europe.[13]

Modern scholars might be "puzzled whether they [Eskimos] were Indians, or a separate and somewhat mysteriously distinct people on earth . . . ."[14] The panel below seemed puzzled whether the native people of Hawai'i are "Indians." Such distinctions would themselves have puzzled the Founding generation. The "Indians" were many peoples, with distinct languages, cultures and socio-political organizations. They had diverse origins, perhaps Asia, perhaps Europe, perhaps the lands of the Bible. But from wherever they came, and whatever their distinct cultures and governments, they were all "Indians," for they were aboriginal inhabitants of the New World. The Founding generation had no difficulty thinking of Eskimos as "Indians." They would have had no more difficulty treating as "Indians" native peoples whose origins lay a thousand years ago in the South Pacific. As far as the Founders knew, all the "aboriginal inhabitants" of the New World came from the South Pacific via the "imperfect navigation of ancient times."

B. The Founding Generation Used "Tribes" to Denote Peoples of Like Kind or Kin

Petitioner assumes that the word "Tribe" in the Constitution refers to some specific type of government or social organization. It is not so. All Native American peoples were "tribes," whether they lived in villages or spread out in vast federations or empires. "Tribe" and "nation" were used to refer not to governments, but to groups of people recognizing a common membership or identity as such. Application of the biblical concept of "tribes" to the "Indians" reflected the understanding that the natives of the New World were not one people, but many "peoples," "nations," or "tribes"—terms used inter-

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[13] Jefferson, *Notes*, *supra*, at 226.

[14] Josephy, *supra*, at 57; *see also Oxford English Dictionary* (1 "ed.) ("*OED*"), "Indian" ("The Eskimos . . . are usually excluded from the term").

changeably well into the Nineteenth Century.[15]

Eskimos lived in small clans or villages that some scholars distinguish from "tribes." The Founding era knew no such technical usage. Notwithstanding the absence of clear government, Eskimo peoples were called "Tribes" and "Nations."[16]

More generally, peoples of every sort were "tribes." In Gibbon's already popular *Decline and Fall of the Roman Empire* (1776), the early inhabitants of Britain were said to live in "Tribes."[17] The early Greeks and Romans were "tribes." Welshmen belonged to Tribes.[18]

For the Founding generation, "tribes" came into the language from the most widely read account of tribal history — the biblical story of the Twelve Tribes of Israel.[19] The Bible gives the history of the Tribes from the birth of the sons of Israel, through the growth of the families to immense "tribes" numbering in the tens of thousands. The Bible follows the tribes into captivity and exodus and into Canaan, where the "tribes" lived in a unified Kingdom under Kings David and Solomon.[20] Even under the reign of Kings, the peoples re

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[15] Berkhofer, *supra*, at 16.

[16] Alexander Fisher, *A Journal of a Voyage of Discovery* (1821) ("all the Esquimaux tribes") (quoted in Oswalt, *supra*, at 74); *The Private Journal of Captain G.F. Lyon*, (1824) (an Eskimo "tribe") (*quoted in* Oswalt, *supra*, at 179); George Lyon, *A Brief Narrative of an Unsuccessful Attempt to Reach Repulse Bay* (1825); *Narrative of the Second Arctic Expedition Made by Charles F. Hall* (Nourse, ed., 1879), 63 (describing "tribe" of "Eskimo"); John Murdoch, "Review of *The Eskimo Tribes*," *American Anthropologist*, 1:125-133 (1888); Heinrich Rink, *Tales and Traditions of the Eskimo* (1875) 1-5 (describing small and large divisions of Eskimos as "tribes").

[17] Vol. 1, p. 33 (describing the "tribes of Britons" who "took up arms with savage fierceness" and the "love of freedom without the spirit of union.")

[18] *OED*, "Tribe," def. 2.a-d.

[19] *OED*, "Tribe" (application of the word "to the tribes of Israel . . . from its biblical use, was the earliest use in English").

[20] *Genesis* 49:1- 28 (Jacob predicts the fate of the twelve tribes); *Numbers* 1 (God instructs Moses to call heads of each tribe); 2 *Samuel* 5:1-3 (leaders

mained "tribes." When King Solomon dedicated the temple in Jerusalem, he called together the leaders of the "tribes":

> Solomon assembled the elders of Israel, and all the heads of the tribes, the chief of the fathers of the children of Israel, unto King Solomon in Jerusalem, that they might bring up the ark of the covenant of the Lord out of the city of David, which is Zion.[21]

When the Kingdom ended, it divided by tribe. The tribes of Benjamin and Judah fought the other tribes that revolted and were "lost."[22] Throughout all this history, through the unification and monarchical period, through the revolt and diaspora, the Bible taught that the people of Israel remained "tribes," led by their "chief fathers."[23] In the New Testament, all the peoples of the earth were "tribes."[24] In the founding generation, "tribes" in the New World, like "tribes" in the Bible, referred not to a form of social organization or government, but to "peoples" who identified themselves by kin, tradition, or faith.

The Founders had seen analogies to the complex tribal history of the Bible. The Founders knew the native peoples evolved, united and divided in ever shifting forms of government. The native peoples had formed "powerful confederac[ies]," tribes united under common chiefs, and federations of tribes joined with other federations.[25] The colonies and the States under the Articles of Confederation had repeatedly dealt with vast federations of tribes, including the "Six Nations" in

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of tribes form league under King David); 1 *Chronicles* 11:1-3 (same); *Psalm* 122 (David expresses joy for the house of God, where tribes give thanks).

[21] 1 *Kings* 8:1 ("King James translation" (1611-1769)); 1 *Kings* 11:12-13.

[22] *See* 1 *Kings* 12; 2 *Chronicles* 10-11, 36; 2 *Kings* 17, 25.

[23] *Ezra* 1:5.

[24] *Matthew* 24:30 (Christ prophesizes that, at the end of time "then shall all the tribes of the earth mourn, and they shall see the Son of man coming").

[25] Jefferson, *Notes on the State of Virginia*, *supra*, at 221.

the north and the "five civilized tribes" in the south.[26] The Indian peoples were "tribes" not because they formed any particular organization, but because they recognized themselves as distinct peoples, with cultures, languages and societies separate from each other and from the European invaders.

By the Founding era, "Tribe" had expanded from groups of people to the natural division of plants and animals. Milton asked in *Paradise Lost*, "Oh flours . . . who now shall reare ye to the Sun, or ranke Your Tribes?" (xi, 279). John Adams wrote, "there is, from the highest Species of animals upon this Globe which is generally thought to be Man, a regular and *uniform Subordination of one Tribe to another down to the apparently insignificant animalcules in pepper Water*."[27] All creation came in tribes. Mankind was organized in tribes, the Animal Kingdom was organized in "tribes," the "Vegetable Kingdom" was organized in "Tribes."[28] To every kind its tribe.

The Founding generation knew Indian peoples who lived in small, leaderless bands; they also knew Indian peoples organized in complex federations and empires. The Europeans and the American colonists understood that the aboriginal peoples warred with and conquered each other, made agreements and alliances, formed confederations and even kingdoms and empires. Through all this complex and still evolving history, the Indian "peoples" were called "Nations" and "Tribes." Contrary to Petitioner's unspoken assumption, the Founding generation would have had no difficulty conceiving of Indian

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[26] *See, e.g.*, Treaty with the Six Nations, Oct. 22, 1784 (treaty with the many tribes of Senecas, Mohawks, Onondagas, Cayugas, Oneida and Tuscarora), *in* C. J. Kappler, ed., *Indian Affairs: Laws and Treaties*, 2:5-6; Treaty of Fort McIntosh, Jan. 21, 1785 (treaty with the Wiandot, Delaware, Chippewa, and Ottawa "and all their tribes"), *in id.* at 2:6-8; Treaty of Hopewell, Nov. 28, 1785 (treaty with all the "tribes" of the Cherokee), *in id.* at 2:8-11.

[27] Adams, July 1756 (emphasis added), in L.H. Butterfield, *et al.*, eds., *Diary and Autobiography of John Adams* (Cambridge, Mass., 1961), I:39.

[28] *Id.*; *see also OED*, "Tribe," 5.a; Cook, *supra*, at ch. II, p. 300 (In the west side of America, "[t]he insect tribe seems to be more numerous").

Tribes who originated in Polynesia, and lived in a "Kingdom" under a "King." Congress has determined that the aboriginal peoples of Hawai`i are, within the meaning of the Constitution, Indian Tribes. That judgment is historically correct.

C. The Historic Distinction Between the Indian Peoples and the European Settlers Was Not Racial

As Jefferson's *Notes on the State of Virginia* and other contemporary works show, the division of the world into "European settlers" and "Indians" was not essentially racial. The Indians were not a race, they were many peoples, thought to share diverse ancestry with peoples all over the world. The distinction between European and Native American peoples was political. The European settlers (who arrived with Royal charters) recognized the "aboriginal peoples" as separate nations — separate sovereigns with whom they would have to deal as one nation to another. Before and after the Constitution, the new settlers treated the Indian peoples as separate nations, with whom they made war, peace and treaties. The treatment of the aboriginal peoples under the Constitution was systematically and structurally distinct from the inhumane and unendurable treatment accorded to "slaves." This distinctive nation-to-nation relationship survived the settlement of the West, the Civil War Amendments, and two hundred years of Congressional action and judicial construction.

D. The Constitutional Convention — Perfecting Congress' Supremacy Over Indian Affairs

The Articles of Confederation gave the Continental Congress power over relations with the Indians only so long as Congress' dealings with Indians *within* a State did not "infringe" that State's legislative power. This created constant friction over where the States' power ended and Congress' power began. The sole stated purpose of the Indian terms of the new Constitution was to eliminate any uncertainty as to Congress' supremacy. The Framers intended to grant Congress broad, supreme authority to regulate Indian affairs. The two references to "Indians" in the Constitution generated virtually

no debate at any time in the Constitutional Convention. That relations with the Indians should be one of the *federal* powers appears to have been universally accepted. The Framers sought only to make clear that Congress' power here was supreme.

The Articles had given the Continental Congress "sole and exclusive right and power" of regulating relations with Indians who were "not members of any of the states, *provided* that the legislative right of any state within its own limits be not *infringed* or violated." Articles of Confederation, Art. X, March 1, 1778 (emphasis added). As Madison explained, this language created two major problems. First, no one knew when or whether Indians were "members of states"; second, the grant to Congress of "sole and exclusive power," so long as Congress did not "intrud[e] on the internal right" of States was "utterly incomprehensible." The provision had been a source of "frequent perplexity and contention in the federal councils."[29] Capitalizing on the uncertainty, several states (Georgia, New York and North Carolina) had infringed Congress' power by making their own arrangements with local Indians. As a result, during the Constitutional Convention and Ratification, Georgia was in armed conflict, and on the verge of war, with the powerful Creek Nation.[30]

The only debate on the issue in the Convention focused on the need for federal *supremacy* over the states. Madison objected early on to the "New Jersey Plan" on the ground that it failed to bar states from encroaching on Congress' power over "transactions with the Indians."[31] In August, Madison

[29] *Federalist* 42, *in* XIV *Documentary History of the Ratification of the Constitution* (J. Kaminski, ed., 1983) ["*Documentary History*"], XV:431.

[30] The need for a powerful federal government to deal with the Indians, and to avoid the then current troubles in Georgia, was a frequent refrain during Ratification. *See, id.* at XIII:507, 557; XV:399, 550; XVIII:12, 152.

[31] "Notes of James Madison," June 19, 1787, *in The Records of the Federal Convention of 1787*, at 3:316 (Max Farrand, rev. ed. 1966) [hereafter, "*Federal Convention*"] ("By the federal articles, transactions with the Indians appertain to Congress. Yet in several instances, the States have entered into treaties & wars with them"); *see also, id.* at 325-26.

proposed that Congress be given the power "[t]o regulate affairs with the Indians as well within as without the limits of the United States."[32] Madison's proposal was submitted to the Committee on Detail without discussion.

The Committee on Detail recommended that power over Indians be dealt with in the Commerce clause, which would provide Congress with power over commerce "with the Indians, within the limits of any State, not subject to the laws thereof." The proposal provoked no debate.[33] On August 31st, the Convention referred various "parts of the Constitution" (including the Commerce Clause) to a "Committee of eleven," including Madison.[34] Without recorded discussion, the Committee recommended that the language be simplified to commerce "with *the Indian tribes*."[35] The Convention accepted the recommendation without debate or dissent.[36]

There is no support for the notion that the reference to "Indian tribes" was intended to *narrow* Congress' authority over Indian affairs. As noted above, the debate in the Convention focused solely on making clear the *supremacy* of Congress' power. During the ratification debates, the new Constitution was defended on the ground that it gave Congress power over "*Indian affairs*" and "trade with the *Indians*."[37] In the only

[32] 2 *Federal Convention*, at 321, 324; *see also id.* at 143 (Rutledge noted that "Indian affairs" should be added to Congress' powers).

[33] *Id.* at 367. Similarly, since Indians did not pay tax, the proposal to exclude "Indians not taxed" from the apportionment clause was accepted without discussion.

[34] *Id.* at 481.

[35] *Id.* at 493, 496-97, 503 (emphasis added).

[36] *See id.* at 495. The language appears in the final version. *Id.* at 569, 595.

[37] *Federalist* 40, *in Documentary History*, XV: 406 (Constitution represents "expansion on the principles which are found in the articles of confederation," which gave Congress power over "trade with the Indians"); Federal Farmer, October 8, 1787, *in id.* at XIV: 24 (under the new Constitution, federal government has power over "all foreign concerns, causes arising on the seas, to commerce, imports, armies, navies, Indian affairs"); Federal Farmer, October 10, 1787, *in id.* at 30, 35 (federal power over "foreign

extended discussion of the issue during Ratification, Madison used the phrases "commerce with the Indian tribes" and "trade with Indians" interchangeably; Madison explained that the purpose of the new provision was to eliminate the limitation on Congress' power over trade with the Indians living within the States.[38] The notion that the reference to "Tribes" was a limit on Congress' ability to deal with the native peoples is without support and is contrary to the only expressions of the Framers' original intent. The Constitution gave Congress power over the Indian peoples, however and wherever it found them.

E. The Founders Asserted Power Over All Indians

The First Federal Congress treated the Constitution as granting broad power to regulate "trade and intercourse" with "Indians," "Indian tribes," "nations of Indians," and "Indian country."[39] Congress understood its power to "operate immediately on the persons and interests of individual citizens."[40]

The actions of the new government also show that even when the Framers knew nothing about the organization of Indian peoples, they nevertheless intended to assert federal power over those peoples. Shortly after taking office, President Washington gave instructions to Commissioners to negotiate with the Creeks. It was, as noted, the war between the Creeks and Georgia that had fostered the apparently universal conclusion that the new federal government must be given supremacy over Indian affairs. Washington instructed the Commissioners to determine the nature of the Creek's political divisions and governments, including "[t]he number of each division"; "[t]he number of Towns in each District"; "[t]he names, Characters

concerns, commerce, impost, all causes arising on the seas, peace and war, and Indian affairs"). The Federal Farmer Letters are considered "one of the most significant publications of the ratification debate." *Id.* at 14.

[38] Madison, *Federalist* 42, *in Documentary History* XIV: 430-31.

[39] "An Act to regulate trade and intercourse with the Indian tribes," July 22, 1790, ch. 33, §4, 1 Stat. 137, *in 1 Doc. Hist. of the First Federal Congress, 1789-1791* (De Pauw, ed., 1972) ["*First Federal Congress*"], at 440.

[40] Madison, *Federalist* 40, *in Documentary History*, XV: 406.

and residence of the most influential Chiefs — and . . . their grades of influence." And, most tellingly, the Commissioners were to learn "*[t]he kinds of Government (if any)* of the Towns, Districts, and Nation."[41] Washington, like other Founders, did not know how the Creek lived and how (if at all) they governed themselves. But however the Indian peoples lived, and however (if at all) they governed themselves, they were still Indian peoples and they were still subject to the supreme power of the Federal Government over Indian Tribes.

Jefferson gave similar instructions to Lewis and Clark. When they encountered unknown Indian peoples, the explorers were to learn the "names of the nations"; "their relations with other tribes or nations"; their "language, traditions, monuments"; and the "peculiarities in their laws, customs & dispositions."[42] Like Washington, Jefferson knew there was much he and his fellow citizens did not know about the "Indian" peoples; but he intended to find out and to assert federal authority over whatever he found.

It is inconceivable anyone thought that if Washington's Commissioners or Lewis and Clark found a native people living without "chiefs," like many Eskimo, or under a King like Montezuma or Kamehameha, these people would be beyond Congress' power over Indian "tribes" or nations.

II. FRAMING OF THE FOURTEENTH AMENDMENT

A. The Fourteenth Amendment Was Not Intended to Abolish Congress' Power Over Native Peoples

The Framers of the Fourteenth Amendment did not intend to eliminate Congress' special power to adopt legislation singling out and favoring Indians; they did not intend to alter the nation-to-nation relationship between the United States and the Indian peoples created by the Constitution. Indeed, the

[41] Washington, Instructions to the Commissioners for Southern Indians, August 29, 1789, *in* 2 *First Federal Congress*, at 207 (emphasis added).

[42] Thomas Jefferson, "Instructions to Captain Lewis," June 20, 1803, *in* Jefferson, *Writings*, *supra*, at 1126, 1128.

Framers of the Amendment were at pains to make certain that they preserved that structure.

"Indians" are expressly singled out for special treatment by the text of the Amendment. In order to eliminate the morally repugnant language which counted slaves as three-fifths persons, the Framers of the Fourteenth Amendment redrafted the apportionment clause. The Framers deleted the "three-fifths persons," but retained the express exclusion of "Indians not subject to tax" (Amend. XIV, §1), because, while they intended to wipe out the badges and incidents of slavery, they intended to preserve the special relationship between the United States and the Indian peoples: Before and after the Amendment, Indians were not citizens, they did not vote, they did not count for apportionment, and they were subject to special legislation in furtherance of Congress' historic trust responsibilities.

The only debate during the drafting and ratification of the Fourteenth Amendment was not about *whether* the special relationship with the Indian peoples should be preserved, but about how to make certain it was preserved. When one Senator suggested that specific reference be made excluding "Indians" from the citizenship clause, the Senator presenting the clause argued this was unnecessary. The Amendment provided citizenship only to persons "within the jurisdiction" of the United States,[43] and Indian nations were treated like alien peoples not fully within the jurisdiction of the government:

> . . . in the very Constitution itself there is a provision that Congress shall have power to regulate commerce, not only with foreign nations and among the States, but also with Indian tribes. That clause, in my judgment, presents a full and complete recognition of the national character of the Indian tribes.[44]

Congress debated what language to adopt in order to make certain that the special status of the Indian tribes was

[43] Similar limiting language occurs in the Equal Protection Clause.

[44] *Cong. Globe*, 39th Congress, 1st Sess. 2895.

preserved.[45] There was no support for, or consideration given to, eliminating the special relationship between the United States and the Indian peoples. The uniform intent was to preserve Congress' ability to decide when Indians would be granted citizenship, when Indians would be taxed, and when Indians would be subject to special legislation.[46]

It is hard to imagine, as Petitioner seems to do, that the Framers of the Fourteenth Amendment expressly singled out Indians to be deprived of the rights of citizenship and apportionment, and yet intended to abolish Congress' special power to enact legislation for the benefit of the Indian peoples. The position is not only without historical support, it is contrary to Congress' clear efforts to preserve the separate status of the Indian peoples. As one Senator leading the charge for civil rights that year urged his colleagues in connection with a civil rights act, "I should be very glad if our friends would not embarrass this general bill with provisions in regard to this particular class of persons [Indians]. *Let them be legislated for separately.*"[47] On this, there was agreement. The separate treatment of the Indian tribes was woven into the structure in Constitution and preserved by the Civil War Amendments.

III. SPECIAL TREATMENT OF ALASKA NATIVES

A. The Framers of the Fourteenth Amendment Treated Alaska Natives as "Indian Tribes"

Congress proposed the Fourteenth Amendment by two-thirds majority; in 1867, after ratification, the Fortieth Congress declared the Amendment the law of the land. The *same*

[45] *See, e.g.*, Remarks of Sen. Doolittle, *Cong. Globe*, 39th Cong., 1st Sess., 2895-2896 (1866) ("[Senator Howard] declares his purpose to be not to include Indians within this constitutional amendment. In purpose I agree with him. I do not intend to include them. My purpose is to exclude them").

[46] Congress expressed the same intent in the Civil Rights Act that same year. The Act, granting citizenship to the emancipated slaves, specifically excluded "Indians not taxed." Civil Rights Act, ch. 31, 14 Stat. 27 (1866).

[47] Remarks of Sen. Trumbull, *Cong. Globe*, 39th Congress, 1st Sess., 527.

Congress ratified the Treaty of Cession with Russia for the acquisition of Alaska. The Treaty reaffirmed the special place of, and Congress' special power over native peoples. The treaty provided that all Alaskan inhabitants

> *with the exception of uncivilized native tribes*, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States and shall be maintained and protected in the free enjoyment of their liberty, property and religion. *The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.*[48]

Congress agreed that "Alaskan Natives [would be] under the guardianship of the federal government and entitled to the benefits of the special relationship" between the United States and the Indian tribes.[49] "It is," as this Court noted in a related context "improbable, to say the least, that the same Congress which affirmatively approved . . . these . . . Indian preferences was, at the same time, condemning [them under the equal protection clause] as racially discriminatory." *Morton v. Mancari*, 417 U.S. 535, 548-49 (1974).

B. The Diversity of Alaska Native Government — from the Primeval Village to ANCSA

Alaska Natives are comprised of at least three distinct groups: Athabascans, Eskimos, and Aleuts.[50] Current scholarship suggests that the Athabascan peoples migrated across the Bering land bridge more than 10,000 years ago. The Eskimos and Aleuts appear to have migrated, in Jefferson's phrase, through "ancient navigation" in various waves, some as recently as two thousand years ago.[51] Since the acquisition of

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[48] Treaty of March 30, 1867, 15 Stat. 539, 542.

[49] *Alaska Chapter v. Pierce*, 694 F.2d 1162, 1168-69 (9th Cir. 1982).

[50] Federal Field Committee, *Alaska Natives & the Land* 39, 99-128 (1968); Hubert Bancroft, *History of Alaska* 69-84 (1886).

[51] Field Committee, *supra*, at 129-284; Josephy, *supra*, 60-61.

Alaska, Congress has treated these peoples as "Indian Tribes."[52]

Congress also has recognized and promoted diverse forms of self-governance for Alaska Natives — from small villages to vast regions. The vast majority of Alaska Natives—particularly Eskimos and Aleuts — have traditionally lived in Native villages, not in the reservations or tribal governments common in the 'lower 48.'[53] The villages are distinct Native communities. Some of them are organized on a traditional basis, with village councils and leaders. Others have organized under the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq.* They have constitutions, bylaws, and charters, provide municipal services and engage in business. A few villages have even incorporated as cities under state law.[54] All the Native villages are communities of aboriginal peoples and thus "Indian tribes" under the Constitution.[55]

Congress has also provided other forms of self-government unique to Alaska Natives, under the Alaska Native Claims Settlement Act ("ANCSA"), 43 U.S.C. § 1601, *et seq.* ANCSA effected a "fair and just settlement of all claims by Natives . . . of Alaska, based on aboriginal land claims." *Id.* § 1601(a). Under ANCSA, Congress distributed land and money to *state chartered corporations* mirroring preexisting Native organizations. ANCSA authorized more than 200 Native villages to

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[52] *See* Felix S. Cohen, *Handbook of Federal Indian Law* 404 (1941) ("The legal position of the individual Alaskan natives has been generally assimilated to that of the Indians of the United States. It is now substantially established that . . . the laws of the United States with respect to the Indians . . . are generally applicable to the Alaskan natives.").

[53] In *Morton v. Ruiz*, the Court noted approvingly Congress' decision to provide welfare benefits to Alaska Natives, even though they were not Indians living "on or near reservations." 415 U.S. 199, 212 (1974).

[54] Field Committee, *supra*, at 5-6, 47.

[55] In 1936, the IRA was amended to enable Alaska Natives, including those "not [previously] recognized as [Indian] bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" to organize and receive benefits. 25 U.S.C. § 473a.

create "village corporation[s]," and to receive statutory benefits as such. *Id.* § 1607.[56] ANCSA also authorized the creation of twelve "regional corporations" to serve Alaska Natives living in areas covered by twelve existing regional Native organizations. 43 U.S.C. § 1606. The regional corporations receive lands and money, manage settlement assets, and share certain revenues with their shareholders and village corporations.[57] Both village and regional corporations are "bod[ies] of Indians" organized under congressional authorization into "communities under one leadership." *See Montoya v. United States*, 180 U.S. 261, 266 (1901). The government validly exercises its authority over Indian affairs through such entities. *See United States v. John*, 437 U.S. 634, 650 n.20; 652-53 (1978).[58]

The unique ANCSA corporations serve Congress' trust obligation to the Alaska Native communities who surrendered their aboriginal land claims.[59] The corporations reflect Congress' effort to tailor its historic goals to the particular

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[56] *Seldovia Native Ass'n v. United States*, 144 F.3d 769,772 (Fed.Cir. 1998).

[57] *Seldovia*, 144 F.3d at 772-73; *Broad v. Sealaska Corp.*, 85 F.3d 422, 425 (9th Cir. 1996), *cert. denied*, 519 U.S. 1092 (1997).

[58] Several federal statutes include Alaska Native villages and ANCSA corporations as "Indian tribes." *See, e.g.*, Indian Tribal Self-Determination and Education Assistance Act of 1975, 25 U.S.C. § 450b(e); Tribally Controlled Community College Assistance Act, 25 U.S.C. § 1801(2); Indian Health Care Improvement Act, 25 U.S.C. § 1603(d); Indian Child Welfare Act, 25 U.S.C. § 1903(8) (including Native villages). Other laws recognize Alaska Native villages as "tribes" for broader purposes. *See* 63 Fed. Reg. 71941, 71945-46 (1998). *See generally* Appendix A hereto.

[59] Congress permits ANCSA Corporations to restrict the right to vote in corporate governance to Alaska Natives. 43 U.S.C. § 1606(3)(D)(i); *Alaska ex rel. Yukon Flats Sch. Dist. v. Native Village of Venetie*, 101 F.3d 1296, 1296 (9th Cir. 1996), *rev'd on other grounds*, 118 S. Ct. 948 (1998). This limitation reflects Congress' historic goal of promoting Native self-governance and mirrors the traditional restriction on the right to vote in tribal government to members of the tribe. American Indian Policy Review Comm'n, 95th Cong., 1st Sess., Final Report 108-09 (1977) ("the tribe, as a political institution, has primary responsibility to determine tribal membership for purposes of voting in tribal elections . . . and other rights"); *see Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 n.32 (1978).

circumstances of the Alaska Native peoples. Just as Congress has chosen to organize and deal with new tribes and confederations of tribes or nations like the "Six Nations" or the "Creek Nations" or "the five civilized tribes," Congress exercises its constitutional powers and responsibilities over Alaska Natives through village and regional corporations.[60] Congress has chosen to permit a statewide approach to self-governance for Native Hawaiians, an approach consistent with the statewide governments of these peoples before the age of exploration.

IV. ARGUMENT

A. John Marshall's Conception of the Indian 'Nations'

For two hundred years, this Court has recognized the *political* distinction the Constitution draws between "Indian tribes" and all other people. The early opinions of Chief Justice John Marshall reflect the original intent of the Framers and lay the groundwork for this Court's jurisprudence. Marshall wrote that "[t]he condition of the Indians in relation to the United States is perhaps unlike that of any other two people in existence." *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 16 (1831). With deliberate irony, he called the Indian tribes "domestic dependent nations." *Id.* at 17. The Indian peoples had surrendered "their rights to complete sovereignty," *Johnson v. McIntosh*, 21 U.S. (8 Wheat.) 543, 572-74 (1823), and yet they continued to be "nations" that governed themselves. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 561 (1832).

Marshall knew that the constitutional text reflected this pre-existing nation-to-nation relationship. The Indian Commerce Clause, U.S. Const. art. I., § 3, cl. 8, and the Treaty Clause, *id.* art. II, § 2, cl. 2, granted Congress broad power to regulate Indian affairs. These provisions permitted the United States to fulfill its obligations to the dependent Indian "nations" that were its "wards." *Cherokee Nation*, 30 U.S. (5 Pet.) at 17-18; *Worcester*, 31 U.S. (6 Pet.) at 558-59. As "guardian," Congress

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[60] *See Venetie*, 101 F.3d at 1297 ("the trust relationship [between Alaska Natives and the United States] survived the passage of ANCSA").

had both the obligation and the power to enact legislation protecting the Indian nations. *See Worcester*, 31 U.S. (6 Pet.) at 560-61; *accord Cherokee Nation*, 30 U.S. (5 Pet.) at 17 ("[t]hey look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants").

Marshall defined "Indians" broadly to include all of the "original inhabitants" or "natives" who occupied America when it was discovered by "the great nations of Europe." *Johnson*, 21 U.S. (8 Wheat.) at 572-74; *Worcester*, 31 U.S. (6 Pet.) at 544 (1832) (Indians are "those already in possession [of land], either as aboriginal occupants, or as occupants by virtue of a discovery made before the memory of man").[61]

He also conceived of "tribes" in broad, inclusive terms. He used "tribe" and "nation" interchangeably: A "tribe or nation," he noted, "means a people distinct from others" — a "distinct community." *Worcester*, 31 U.S. (6 Pet.) at 559, 561.[62] Like the Founders, Marshall defined an "Indian tribe" as nothing more than a community, large or small, of descendants of the peoples who inhabited the New World before the Europeans.

Although the aboriginal "tribes" or "nations" or "peoples" were defined in part by common ancestry — or, as petitioner likes to say, by "blood" — their constitutional significance lay in their separate existence as "independent *political* communities." *Id.* at 559 (emphasis added). The "race" of Indian peoples was constitutionally irrelevant. Native peoples were "nations," *id.* at 559-60, and the relationship between the United States and the Natives reflected a political settlement between conquered and conquering nations.

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[61] *See Johnson*, 21 U.S. (8 Wheat.) at 575 (Indians in French Canada); *id.* at 581 (Indians in Nova Scotia); *id.* at 584-87(Indians in Virginia, Kentucky, the Louisiana Purchase, and Florida). Marshall noted the United States had dealt with variously organized "tribes" or "confederacies." *See id.* at 546-49.

[62] *See also Cherokee Nation*, 30 U.S. (5 Pet.) at 20 ("an Indian tribe or nation within the United States"); *Johnson*, 21 U.S. (8 Wheat.) at 590 ("the tribes of Indians inhabiting this country").

This Court has kept faith with Marshall's conception: The Indian Nations have always been defined by ancestry *and* political affiliation. It could not be otherwise. In the Native cultures, the two are inextricably intertwined. The Court's definition is legal, and the Native American's self-definition is historic, religious or cultural; but the two reduce to the same elements: "Indians" are (i) the descendants of aboriginal peoples who (ii) belong to some Native American "people," "nation," "tribe," or "community," as the founding generation understood those terms.[63]

B. "Native American" is Not a "Racial" Distinction

These interwoven qualifications reflect this Court's consistent understanding that constitutionally relevant Indian status, while based in part on ancestry, is a political classification. *United States v. Antelope*, 430 U.S. 641, 646-47 (1977). It is an individual's membership in a "political community" of Indians — even a community in the making — and not solely his or her racial identity, that brings him or her within Congress' broad authority to regulate Indian affairs. *Id.* at 646.

Petitioner's suggestion that the use of blood quantum as part of the formula to determine who is and is not a Native American constitutes impermissible "racial" discrimination ignores two hundred years of constitutional jurisprudence. This Court has repeatedly made clear that Indian tribes are the political and familial heirs to "once-sovereign political communities" — not "racial groups."[64] This Court has long

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[63] *See, e.g., Montoya*, 180 U.S. at 66 ("a body of Indians of the same or a similar race, united in a community under one leadership or government, and inhabiting a particular though sometimes ill-defined territory "); *United States v. Candelaria*, 271 U.S. 432, 442 (1926); *see Oklahoma Tax Comm'n v. Sac & Fox Nation*, 508 U.S. 114, 123 (1993); *Antelope*, 430 U.S. at 647 n.7 (individuals "anthropologically" classified as Indians may be outside Congress' Indian commerce power if they sever relations with tribe).

[64] *Antelope*, 430 U.S. at 646; *see Fisher v. District Court*, 424 U.S. 382, 389 (1976); *Mancari*, 417 U.S. at 553-54; *see also Sac & Fox Nation*, 508 U.S. at 123; *United States v. Mazurie*, 419 U.S. 544, 557 (1975).

recognized that a tribe's "right to determine its own membership" is "central to its existence as an independent political community."[65] From time immemorial, Native American communities have defined themselves at least in part by family and ancestry.[66] Kinship and ancestry is part of what it means to be an "Indian." Indians by ancestry or blood is what the Framers meant by "Indians." It is what Chief Justice Marshall meant by "Indians." It is what the Framers of the Fourteenth Amendment meant by "Indians." This central conception of "Indian" identity is woven into the Constitution and the entire body of law that has grown up in reliance on that conception.

Congressional authority to use such traditional requirements for tribal membership or benefits has never been doubted. In *John*, this Court approved Congress' creation of an Indian reservation for the benefit of "Chocktaw Indians of one-half or more Indian blood, resident in Mississippi," 437 U.S. at 646. The Court unhesitatingly applied the definition of "Indian" that appears in the IRA, which has governed Indian Tribes for most of this century: "'all other persons of one-half or more Indian blood.'" *Id.* at 650 (quoting 25 U.S.C. § 479). Similarly, ANCSA's use of a blood quantum formula as one factor in determining "Native" status is a valid method of defining those belonging to the group eligible for statutory benefits, and the use of the blood quantum "does not detract from the political nature of the classification."[67] The use of blood ties is integral to the nature of the political deal struck between the conquering

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[65] *Santa Clara Pueblo*, 436 U.S. at 72 n.32; *Cherokee Intermarriage Cases*, 203 U.S. 76, 95 (1906); *Boff v. Burney*, 168 U.S. 218, 222-23 (1897).

[66] *See Indian Policy Report* at 108-09 ("the tribe, as a political institution, has primary responsibility to determine tribal membership *for purposes of voting in tribal elections* . . . and other rights arising from tribal membership. Many tribal provisions call for one-fourth degree of blood of the particular tribe but tribal provisions vary widely. A few tribes require as much as one-half degree of tribal blood . . . ."); *accord* Felix S. Cohen, *Handbook of Federal Indian Law* 22-23 & n.27 (1982 ed.).

[67] *Alaska Chapter*, 694 F.2d at 1168-69 n.10 (noting absence of other practicable methods, like tribal rolls or proximity to reservations).

Europeans and the Native peoples, as they set out to maintain partially separate existences while inhabiting the same country.

The constitutional text and historic relationship gives Congress not just the "right" to discriminate between Native Americans and others, but the *responsibility* to do so. As this Court has long recognized, from the relationship between these former sovereign peoples and the "superior nation" that conquered them arises "the power *and the duty*" of the United States to "exercis[e] a fostering care and protection over all dependent Indian communities within its borders . . . ."[68] Only last term, this Court acknowledged the continued significance of this historic trust relationship.[69]

C. Application of "Indian Tribes" to the Enormous Diversity of Native American Communities

This Court has repeatedly applied the concepts of "Indian" and "Tribe" to a wide variety of Native American communities, recognizing the constant evolution of Native community life and that the questions whether and how to treat with these changing communities are assigned by the Constitution to Congress. In *The Kansas Indians*, the Court recognized that the Ohio Shawnees remained a "tribe," even though tribal property was no longer owned communally and the tribe had abandoned Indian customs "owing to the proximity of their white neighbors." 72 U.S. 737, 755-57 (1866).

Fifty years later, the Court approved similar tribal designation for the Pueblo Indians of New Mexico. After long experience under Spanish rule, the Pueblo Indians seemed little like the "savages" of James Fennimore Cooper. The Pueblo Indians lived in villages with organized municipal governments; they

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[68] *United States v. Kagama*, 118 U.S. 375, 384-85 (1886) (emphasis added); *see Seminole Nation v. United States*, 316 U.S. 286, 296 (1942) (the government owes a "distinctive obligation of trust" to Indians).

[69] *See Greater New Orleans Broadcasting Ass'n v. United States*, 119 S. Ct. 1923, 1934 (1999) (recognizing "special federal interest in protecting the welfare of Native Americans").

cultivated the soil and raised livestock; they spoke Spanish, worshiped in the Roman Catholic Church; prior to the acquisition of New Mexico by the United States, they enjoyed full Mexican citizenship. *See United States v. Joseph*, 94 U.S. (4 Otto.) 614, 616 (1877). Nevertheless, the Pueblo Indians lived in "distinctly Indian communities," and Congress acted properly under the Indian Commerce Clause in determining that they were "dependent communities entitled to its aid and protection, like other Indian tribes." *United States v. Sandoval*, 231 U.S. 28, 46-47 (1913); *Candelaria*, 271 U.S. at 439-40, 442-43. For Native American "communities," the Court held that "the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress . . . ." *Sandoval*, 231 U.S. at 46; *accord Tiger v. Western Inv. Co.*, 221 U.S. 286, 315 (1911).

Sixty years later, in *United States v. John*, the Court recognized Congress' authority to create a reservation for the benefit of Choctaw Indians in Mississippi, even though (1) they were "merely a remnant of a larger group of Indians" that had moved to Oklahoma; (2) "federal supervision over them had not been continuous"; and (3) they had resided in Mississippi for more than a century and had become fully integrated into the political and social life of the State. 437 U.S. at 652-53. The Mississippi Choctaw were Indians. They had recently organized into a distinctly Indian community. The Court therefore deferred to Congress' determination that they were a "tribe for the purposes of federal Indian law." *Id.* at 650 n.20; 652-53.

Similarly, this Court has recognized Congress' broad authority to deal with individual "Indians"[70] or large organizations comprised of numerous "Tribes."[71] Congress may create or recognize new aggregations of Native Americans, so long as such legislation is rationally related to the fulfillment of Congress' trust obligation to the historic Indian peoples.[72] Congress' treatment of the Alaska Native peoples — including the creation of unique regional corporations whose shareholders comprise numerous Native Villages — has properly been upheld as within Congress' special power over and responsibility for the Native American peoples.[73]

[70] *United States v. Holliday*, 70 U.S. (3 Wall.) 407, 417 (1865) (regulation of "commerce with the Indian tribes means" regulation of "commerce with the individuals composing those tribes"); *see Ruiz*, 415 U.S. at 230-38 (addressing the scope of federal Indian welfare benefits for individuals living in Indian communities); *Mancari*, 417 U.S. at 551-55.

D. Petitioner's Suggestion That This Court Overrule *Morton v. Mancari* Should Be Rejected

Petitioner suggests that, if *Mancari* permits members of Indian tribes, defined in part by ancestry, to receive special treatment, then *Mancari* "would be irreconcilable with this Court's equal protection jurisprudence, particularly *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and would have to be overruled." Pet. Br. at 42 n.17. Petitioner misreads *Mancari* and *Adarand* and provides no basis for sweeping away two hundred years of settled law.

[71] *See Cherokee Nation v. Journeycake*, 155 U.S. 196 (1894) (Delaware Indians entitled to rights of Cherokee Nation which Delawares had joined); *United States v. Blackfeather*, 155 U.S. 218 (1894) (same for Shawnee).

[72] *See John*, 437 U.S. at 652-53; *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463, 480 (1976).

[73] Although the Alaska Natives' situation is "distinctly different from that of other American Indians," *Alaska Chapter*, 694 F.2d at 1168-69 n.10; *see Metlakatla Indian Community v. Egan*, 369 U.S. 45, 50-51 (1962), it is "well established" that Athabascan Indians, Eskimos, and Aleuts are "dependent Indian people" within the meaning of the Constitution. *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 87-89 (1918); *see also*, *Pence v. Kleppe*, 529 F.2d 135, 138-39 n.5 (9th Cir. 1976) ("Indian" means "the aborigines of America" and includes Eskimos and Aleuts in Alaska); *United States v. Native Village of Unalakleet*, 411 F.2d 1255, 1256-57 (Ct. Cl. 1969) ("Eskimos and Aleuts are Alaskan aborigines" and, therefore, "Indians").

1. "Native American" is Not a "Suspect" Classification

As the history shows, and as this Court has long recognized, the express constitutional provisions creating Congress' special power over the Indian tribes are based not on race, but on the political recognition of "Indian tribes" as "'domestic dependent nations.'" *Oklahoma Tax Comm'n v. Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991). Congressional treatment of Indians is subject to the rational basis standards reserved for political classifications.

> On numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment. [¶] The test to be applied to these kinds of statutory preferences, which we said were neither "invidious" nor "racial" in character, governs here. . . . As long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed.[74]

The inseparable burdens and benefits applicable only to Native Americans are based not on race, but on a political resolution of issues uniquely consigned by the Constitution to Congress and subject to judicial review, if at all, under the deferential rational basis standard.[75]

2. The Equal Protection Clause Does Not Eliminate Congress' Power to Regulate Indian Affairs

Petitioner argues that this Court's 1995 decision in *Adarand* somehow establishes a new 14th Amendment limit on Congress' powers respecting Indians. This contention is

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[74] 425 U.S. at 480; *Antelope*, 430 U.S. at 645 (Indian legislation "repeatedly . . . sustained . . . against claims of unlawful racial discrimination").

[75] *Antelope*, 430 U.S. at 646 ("federal regulation of Indian affairs is not based upon impermissible classifications."); *Moe*, 425 U.S. at 479-80 (applying rational basis scrutiny to tax preference favoring Indians because it is not "invidious discrimination against non-Indians on the basis of race").

directly contrary not only to *Adarand*, but also to the Court's repeated statements about both the history and purpose of the 14th Amendment. *Adarand* held only that *racial* classifications are subject to strict scrutiny (whether enacted by Congress or by the states). *Adarand* did not and could not eliminate Congress' textually-based, constitutional authority to deal with the "Indian Tribes." Indeed, Justice O'Connor's opinion made clear that the Court was articulating only a "general rule" that did not affect the *political* powers of government, such as the enumerated federal power over immigration to deal with racial groups.[76]

Moreover, the Court took pains to point out that it was *not* overruling "long-established precedent that has become integrated into the fabric of the law." 515 U.S. at 233. The Court's decision left firmly in place long standing precedents, like those involving Native Americans, that were "likely to have engendered substantial reliance." *Id. Mancari* reflected two centuries of jurisprudence concerning the relationship between the United States and Native Americans. It also confirmed what a hundred years of jurisprudence and the legislative history of the 14th Amendment make clear: that the Amendment was not intended to abolish Congress' authority over Indian affairs.[77] *Mancari* reflected settled law when it held that statutory employment preferences for persons who were "one fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe" did "not constitute 'racial discrimination.'" 417 U.S. at 553, n.24. *Mancari* also reflected settled law in affirming Congress' power to grant preferences for individual Indians as "members of quasi-sovereign tribal entities." *Id.* at 554.

In over 130 years since the adoption of the 14th Amendment, and in the twenty-five years since *Mancari*, in case after

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[76] *Adarand*, 515 U.S. at 217-18 ("special deference to the political branches of the Federal Government" in such cases is "appropriate").

[77] *Cf. Elk v. Wilkins*, 112 U.S. 94, 102-03 (1884) (14th Amendment citizenship and apportionment clauses did not alter status of Indians).

case, this Court and the lower federal courts have integrated these principles into the fabric of the law, upholding an enormous "variety of statutes and decisions according special treatment" to native peoples. *Moe*, 425 U.S. at 480.[78] Native Americans throughout the country have ordered their ways of life around this enormous body of law. To subject all these statutes to "strict scrutiny" would have enormous and disastrous consequences for the government's dealings with the Native American peoples.

> If these laws, derived from historical relationships and explicitly designed to help only Indians, were deemed invidious racial discrimination, an entire Title of United States Code (25 U.S.C.) would be effectively erased and the solemn commitment of the Government toward the Indians would be jeopardized.[79]

Nothing in *Adarand* or in the history of the 14th Amendment requires or justifies such a revolution. As this Court has recognized since *Adarand*, the government's solemn commitment to a special relationship with the Indian peoples lives on.[80]

CONCLUSION

The decision of the Court of Appeals should be affirmed.

Dated: July 28, 1999 Respectfully Submitted,

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[78] *See United States v. Cohen*, 733 F.2d 128, 139 (D.C. Cir. 1984) (en banc). (Scalia J.) (rejecting equal protection challenge because "the Constitution itself . . . 'singles Indians out as a proper subject for separate legislation'").

[79] *Mancari*, 417 U.S. at 555, *quoted with approval in Moe*, 425 U.S. at 480, *and in Antelope*, 430 U.S. at 645.

[80] *See Oklahoma Tax Comm'n v. Chickasaw Nation*, 515 U.S. 450, 457-62 (1995); *Seminole Tribe v. Florida*, 517 U.S. 44, 62, 72 (1996) (recognizing the viability and significance of the Indian Commerce Clause); *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 953-54 (1998) (recognizing the federal power over Indian country).

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APPENDIX A

Additional Federal Statutes Specifically Benefitting Alaska Natives

1. 7 U.S.C. § 5930 (relating to grants to establish education programs to promote subsistence farming "on Indian reservations and tribal jurisdictions," including Alaska Natives and ANCSA lands, per Pub. L. 102-237, sec. 932(2), (3), 105 Stat. 1906).

2. 12 U.S.C. § 4702(11) (relating to special treatment for ANCSA lands and other areas of "Indian country" for purposes of the Community Development Banking and Financial Institutions Act, 12 U.S.C. § *4701ff*).

3. 16 U.S.C. 1721, 1722(5)-(7), 1723, 1729(a)(1) (providing special funding arrangements for, and Native American participation in, conservation projects under the Public Lands Corps Act of 1993).

4. 20 U.S.C. § 1106b(c)(7) (giving special consideration to participants in State-Federal Teacher Corps who "intend to teach on Indian reservations or in Alaska Native villages").

5. 25 U.S.C. §§ 1452(c),(d), 1466, 1495 (providing tribes and recognized Alaska Native villages with access to revolving loan fund, loan guaranty and loan insurance programs established under the Indian Financing Act of 1974).

6. 25 U.S.C. § 1644(a) (authorizing Secretary of the Interior to make grants to or assistance contracts with tribal organizations for health care assistance programs "on or near Federal Indian reservations and trust areas and in or near Alaska Native villages").

7. 25 U.S.C. §§ 2401(1),(2), 2403(3) (including recognized Alaska Native villages among tribal entities entitled to benefit from the Indian Alcohol and Substance Abuse Prevention and Treatment Act of 1986, based on the government's "historical relationship and unique legal and moral responsibility to Indian tribes and their

numbers" and the government's obligation to assist Indian tribes in meeting "the health and social needs of their members").

8. 25 U.S.C. §§ 3112 (authorizing government to "establish a program of technical assistance for [Alaska Native Regional] corporations to promote the sustained yield management of their forest resources").

9. 25 U.S.C. §§ 3202(9), 3208 (providing for Indian Child Abuse Treatment Grant programs funded under the Indian Child Protection and Family Violence Prevention Act).

10. 25 U.S.C. §§ 3702, 3703(10) (including Alaska Native villages in programs under the American Indian Agricultural Resources Management Act designed to "carry out the trust responsibility of the United States and promote the self determination of Indian Tribes by providing for the management of Indian Agricultural lands").

11. 26 U.S.C. §§ 45A(c)(6) & (7), 168(j) (establishing Indian employment credit for wages paid to tribal members where services performed on ANCSA lands).

12. 26 U.S.C. § 4225 (providing federal tax exemption for "native Indian handicraft" manufactured by "Indians under the jurisdiction of the United States Government in Alaska").

13. 29 U.S.C. § 1784b(1) (treating Indian reservation communities and "Alaska Native village[s]" as "unit[s] of general local government" eligible to receive and administer emergency funding under the Disaster Relief Employment Assistance program).

14. 42 U.S.C. § 682(i) (authorizing Alaska Native organizations to administer job opportunities and basic skills training programs for Alaska Natives within the regions established by ANCSA).

15. 42 U.S.C. §§ 1437a(b)(9)-(12) (including members of any

"tribe, band, pueblo, group, community, or nation of Indians or Alaska Natives" in HUD low-income housing program).

16. 42 U.S.C. § 1471(b)(6) (defining "Indian Tribe" as including Alaska Native villages for purposes of financial assistance for farm housing).

17. 42 U.S.C. §§ 3002(6) & (7), 3022(2)(B), 3057, 3058aa (authorizing Alaska Native villages to operate Health and Human Services programs to benefit senior Alaska Natives).

18. 42 U.S.C. §§ 3796gg, 3796gg-2(3) (authorizing "any Alaska Native village" to administer grants to combat violence against woman on the same basis as states and other units of local government).

19. 42 U.S.C. § 4368b(c) (including "any Alaska Native village" among other tribal entities authorized to receive EPA grants under the Indian Environmental General Assistance Program Act of 1992).

20. 42 U.S.C. §§ 5302(a)(17), 5306 (including Alaska Native entities as tribes eligible to receive Housing and Urban Development Act grants).

21. 42 U.S.C., §§ 6702, 6707(a)(1), 6707(h)(2)(B) (setting aside funds for grants to Alaska Native villages and other Indian tribes for grants for construction, renovation or improvement of local public works projects).

22. 42 U.S.C. §§ 6722, 6723(c)(3)(D) (making certain Alaska Native entities eligible for financial assistance to stimulate economic recovery).

23. 42 U.S.C. §§ 8802(12) (providing assistance to Indian tribes, including Alaska Native villages, for development of biomass energy and alcohol fuels).

24. 42 U.S.C. § 11472 (setting aside funds for job training

demonstration program and homeless program for Indian tribes, including Alaska Native villages).

25. 42 U.S.C. §§ 13791, 13801, 13861, 13868, 13971, 14151 (authorizing Attorney General to award grants to Alaska Native villages for youth services, for delinquent and at-risk youth residential services program, for community-based justice programs, for coordination of law enforcement officers, prosecutors and advocacy groups involved in domestic violence and child abuse, and to improve[] criminal justice agency efficiency.").

26. 16 U.S.C. §§ 470(d)(2) & 470w(4) and (14) (permitting Indian Tribes and "native village[s]" to assume functions of State Historic Preservation Officers).

27. 20 U.S.C. §§ 7704, 7713 (relating to restrictions on alienation of "Indian lands," including lands conveyed under ANCSA, to a Native individual, Native group, village or regional corporation).

28. 25 U.S.C. §§ 3601 & 3602 (recognizing federal trust responsibility, and establishing federal support under the Indian Tribal Justice Act, for "sovereignty of each tribal government," including "any Alaska Native entity which administers justice under its inherent authority or the authority of the United States").

Supreme Court, U.S.
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No. 98-818

In The

Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF AMICUS CURIAE STATES OF CALIFORNIA, ALABAMA, NEVADA, NEW MEXICO, OKLAHOMA, AND OREGON THE COMMONWEALTH OF THE NORTHERN MARIANA ISLANS AND THE TERRITORY OF GUAM SUPPORTING THE STATE OF HAWAII

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QUESTION PRESENTED

Whether the Court of Appeals correctly held that allowing only the beneficiaries of trust obligations to select the trustees bound to meet those obligations does not violate the Fourteenth or Fifteenth Amendment, when the validity of the underlying trust obligations is unchallenged and the obligations are based on the congressionally recognized status of the beneficiaries as an indigenous people, who – like American Indians and Alaska Natives – were once-sovereign, have claims to aboriginal lands taken by the Federal Government, and occupy a long-standing special trust relationship with the United States?

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INTRODUCTION AND INTEREST OF AMICI

This case presents issues of unique importance to the amici States, most of which entered the Union under admission or statehood acts that imposed various requirements as conditions of statehood, and Pacific Island territories and Commonwealths that support the resolution of Native Hawaiian issues. Amici support their sister State of Hawaii as this Court reviews the constitutional consequences of state action taken pursuant to trust responsibilities assumed by Hawaii for the native people of Hawaii. Initially, Hawaii, as a condition of its statehood, assumed a trust obligation which includes among its purposes "the betterment" of "native Hawaiians" who were of "not less than one-half part of the races inhabiting the Hawaiian Islands previous to 1778." To further that purpose and (following Congress' lead in post-1959 enactments) extend it to *all* descendants of native Hawaiians, Hawaii amended its constitution in 1978 to create the Office of Hawaiian Affairs ("OHA"). That office is charged with implementing the trust responsibility to benefit and support all Hawaiians (now defined as "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii"). The OHA's trustees manage revenues that support the agency's various cultural, economic development and educational programs targeted to "native Hawaiians" and "Hawaiians," and only persons who fall into one of those classifications may vote in statewide elections to pick OHA's trustees.

Petitioner presents a Fourteenth and Fifteenth Amendment challenge to the state constitutional and legislative scheme established by Hawaii in furtherance of

its trust obligation, while leaving the obligation itself unchallenged. In his claim that the Hawaii voting scheme runs afoul of the Equal Protection Clause of the Fourteenth Amendment, petitioner asserts that native Hawaiians do not enjoy the same "special relationship" that exists between the United States and Indian tribes, a relationship recognized in *Morton v. Mancari*, 417 U.S. 535 (1974). Under that "special relationship," legislation that favorably treats Indians may be upheld as a political classification, not an impermissible racial classification. While a State may not legislate contrary to federal law or treaties entered into by the federal government, it may enact legislation that furthers the "special relationship," particularly when the federal government has delegated federal responsibilities to the State or has ratified state initiatives, as happened with Hawaii in the creation of OHA. While the underlying trust obligation in this case was unchallenged, petitioner's current challenge appears to require a resolution of the Equal Protection claim under the Fourteenth Amendment. This brief is confined to that question, as it relates most closely to a state's assumption of delegated responsibilities under federal law relating to native or indigenous people. Amici States believe this Court should apply principles from *Morton v. Mancari*, 417 U.S. 535 (1974), to uphold Hawaii's initiatives, as the state's actions are "tied rationally to the fulfillment of Congress' unique obligation[s]" to indigenous people, in this case to all Native Hawaiians,[1] much like Indians in *Mancari*. 417 U.S. at 555.

[1] This brief follows the current federal usage of the term "Native Hawaiian" to refer to *any* "descendant of the aboriginal people who, prior to 1778, occupied and exercised sovereignty in . . . Hawaii," *e.g.*, 16 U.S.C. § 470w(17), regardless of blood quantum. The term "native Hawaiian," with the lower case "n," is used to refer to the more restrictive definition found in the Hawaiian Homes Commission Act of 1920 (HHCA), 42 Stat. 108, which has a fifty percent blood quantum requirement. Under state law, "Hawaiian" means *any* descendant of the aboriginal people. Haw. Rev. Stat. § 10-2. To avoid confusion, this brief occasionally uses the term "Hawaiian people" as synonymous with "Native Hawaiian" (or "Hawaiian"), the broader definition followed in most federal statutes.

SUMMARY OF ARGUMENT

In Hawaii's Admission Act, Congress delegated authority to the new State of Hawaii to further a federal statutory trust responsibility to its indigenous people. Initially, this responsibility was to hold certain lands as a "public trust" for, *inter alia*, "the betterment of the conditions of native Hawaiians . . . in such a manner as the constitution and the laws of the . . . State may provide." This unique delegation of authority for a state to maintain a public trust for a specific class of indigenous people was a proper exercise of congressional power. Statehood is a compact between the sovereign people joining the Union and the Union itself. Congress may set as conditions of statehood requirements that further various federal or national purposes. Congress specifically required Hawaii to observe and administer a federal trust responsibility to those "native Hawaiians" with a fifty percent blood quantum level.

While this delegation of authority to Hawaii related to the more limited category of "native Hawaiians," subsequent acts of Congress clarified that the federal

relationship went to all "Native Hawaiians," including all descendants of the indigenous Hawaiian people. Amici States submit the Admission Act and the subsequent legislation reflect a pre-existing "special relationship" between the federal government and all Hawaiians, a relationship which permits special treatment of the indigenous group without violating the Due Process and Equal Protection provisions of the Constitution. This is because the special relationship is based on a political, not an impermissible racial classification. The States submit Hawaii has acted constitutionally to fulfill the trust responsibilities given to it by the federal government. The subsequent federal legislation re-affirms (1) the authority of Congress to legislate in matters affecting aboriginal or indigenous peoples of the United States, including the native peoples of Alaska and Hawaii; and (2) that a unique trust relationship, akin to that between the United States and Indians and Native Alaskans, exists between the United States and all Native Hawaiians.

Amici States submit the federal government's special relationship is rooted, not in racial characteristics, but in the unique history of Hawaii and in Hawaiian's cultural and religious customs, beliefs, practices and language. Petitioner relies on the formal "tribal" classification in the relationship between the United States and Indian tribes as dispositive of the question whether such a relationship can exist for Native Hawaiians. Contrary to his claim, however, "tribal" membership is not the essential qualification for the special relationship Congress has extended to aboriginal and indigenous peoples. Additionally, Hawaiians had a uniquely developed society with a monarch, chiefs and sub-chiefs, laws and practices

that constituted full nationhood, which was destroyed when the Kingdom of Hawaii was overthrown with the complicity of the United States. Amici States submit the Court should defer to Congress' special expertise in handling the affairs of this Nation's aboriginal and indigenous people. Congress is in the best position to determine when a special relationship exists, based on unique qualities and circumstances relating to the indigenous group.

In addition to the express delegation to Hawaii to administer a trust for native peoples, Congress effectively ratified Hawaii's own actions taken to further the federal trust relationship. In its 1978 constitutional amendments, Hawaii provided, *inter alia*, an Office of Hawaiian Affairs ("OHA") to hold title to certain property in trust for Native Hawaiians, regardless of blood quantum. Hawaii did this to bring the state "in line" with the post-1959 federal legislation that recognized a trust obligation to *all* Native Hawaiians. In turn, Congress ratified OHA's activity by appropriating funds to it, delegating authority to it and requiring consultation with OHA. This congressional ratification of OHA serves as an implied delegation of authority to OHA to act as trustee for its broadly defined set of beneficiaries, *all* Native Hawaiians.

Amici States also believe Hawaii may voluntarily assume responsibilities to further the federal trust responsibility. As States come into the Union as sovereigns, they retain the power to act in this area provided their actions are not preempted by federal legislation or by implication. In Hawaii's case, Congress has gone so far as to ratify OHA's actions. Thus, it does not appear that OHA is acting contrary to existing federal law; indeed, its

actions further the trust relationship. As against constitutional challenges, this Court has upheld legislation that is "rationally tied to the fulfillment of Congress' unique obligation[s]" to Indians. The same rule should apply with respect to actions taken by Hawaii to support and protect Native Hawaiians. Here, OHA's objectives are designed and carried out precisely as Congress has suggested.

Finally, there is no merit in petitioner's claim that OHA and its trustee election laws violate this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989). Under *Adarand* and *Croson*, all "racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, at 227. Amici States submit that OHA and the trustee elections are actions taken to fulfill the purposes of the federally-created and -ratified trust and are not racial classifications of the type prohibited by *Adarand* and *Croson*. Given the "special relationship" between the federal government, which mandated and expanded the trust relationship, and the Native Hawaiians, the proper management of the trust obligation requires actions that benefit the class of persons designated as the beneficiary – all Native Hawaiians. That class is not a racial one, but a more complex classification that recognizes the unique historical circumstances relating to an aboriginal and indigenous people, who were deprived of their land and sovereignty. As Hawaii's initiatives are "rationally tied to the fulfillment of Congress' unique obligation[s]" to Native Hawaiians,

this Court should uphold Hawaii's initiatives as constitutional.

I. CONGRESS, THROUGH HAWAII'S ADMISSION ACT, NUMEROUS SUBSEQUENT ACTS, AND RATIFICATION OF HAWAII'S LEGISLATION, HAS PROPERLY DELEGATED AUTHORITY TO THE STATE OF HAWAII TO FURTHER A FEDERAL TRUST RESPONSIBILITY TO ALL HAWAIIAN NATIVES

The critical starting point for understanding the unique authority Hawaii has undertaken to protect and further the interests of Native Hawaiians is the action taken by the Congress in admitting Hawaii into the Union. Hawaii was admitted as a State in 1959 by way of the Admission Act, Pub. L. 86-3, 73 Stat. 4 (1959). Under section 5(f) of that Act, Congress conveyed to Hawaii certain lands with the condition that Hawaii hold these lands (and the proceeds of the lands) as a "public trust" for, *inter alia*, "the betterment of the conditions of native Hawaiians . . . in such a manner as the constitution and the laws of the . . . State may provide." *Id.*, § 5(f). This delegation of authority for a state to maintain a public trust for a specific class of indigenous people and to legislate in furtherance of its purposes is unique among admission acts for States of the Union. Many admission acts, such as that for the State of Alaska, include "disclaimers" by the prospective state and its people of "all right and title to . . . any lands or other property" held by Indians or Indian tribes (or Alaskan Natives). *See, e.g.*, Act of July 7, 1958, § 4, 72 Stat. 339 (Alaska Statehood Act). Similarly, many acts, such as the Enabling Act under

which Washington, Montana, North Dakota and South Dakota entered the Union, required that the people of those prospective states acknowledge that Indian and tribal lands were to remain "under the absolute jurisdiction and control of" Congress until Indian title was extinguished. Act of Feb. 22, 1889, ch. 180, § 4, 25 Stat. 676. *See Organized Village of Kake v. Egan*, 369 U.S. 60, 67-70 (1962); *Metlakatla Indian Community v. Egan*, 369 U.S. 45, 57-58 (1962). Except for Hawaii's Admission Act, amici States know of no other congressional measure that conveyed to the prospective state, as a condition of statehood, federal lands to be held as part of a public trust for that state's native or indigenous people.

It is undisputed that this delegation in the Admission Act was proper. First, Congress early on recognized a special relationship between the United States and the Hawaiian people, comparable to that between the federal government and American Indians and Alaskan Natives. *See* Hawaiian Homes Commission Act, 1920 § 201, 42 Stat. 108 (1921). Second, Congress may set as conditions of statehood requirements that further various federal or national purposes, as long as they meet constitutional muster and do not offend the principles of federalism. *See Stearns v. Minnesota*, 179 U.S. 223, 245 (1900). Certainly, the cessions and disclaimers of interest in Indian lands required in the post-1850 statehood acts advanced the national goal of protecting Indian interests. However unpopular these conditions may have been locally, the citizens of the prospective states, acting in their sovereign capacity, were willing to agree to them while guaranteeing in their admission to the Union the preservation of their sovereignty, the general police powers of statehood

and the general protection of the federal government.[2] These conditions did not implicate any constitutional concerns at the time, nor should they now. The disclaimer requirements neither imposed nor established an impermissible racial classification under the Fifth or Fourteenth Amendment. Indeed, the conditions of statehood served as restrictions only on the prospective states' interest in lands (or fishing rights) belonging to Indians and Indian tribes; they required "disclaimer[s] of proprietary rather than governmental interest[s]." *Organized Village of Kake v. Egan*, 369 U.S. at 69.

So it was also with Hawaii that Congress required, as a condition of statehood, Hawaii's assent to assuming a

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[2] As the Eleventh Circuit expressed it in *United States v. Sanchez*, 992 F.2d 1143 (1993):

> "Congress must have, at some instant, relinquished its authority over territorial lands so that the people of those lands could approach the United States as an independent entity seeking admission to the Union. The process of statehood was, then, one by which a sovereign entity made a compact with the Union to submit to the (then limited) authority of the federal government in exchange for the benefits offered in Article IV Section IV of the Constitution: that 'the United States shall guarantee to every state in the Union a republican form of government, and shall protect each of them against invasion; and on application of the legislature, or of the executive (when the legislature cannot be convened) against domestic violence.' The language of the Tenth Amendment, reserving 'powers not delegated to the United States' to new and existing states and to the people, acknowledges the reservoir of state sovereignty which permitted the formation of a federal union." *Sanchez* at 1149, n.4.

trust obligation with certain lands conveyed to it for, *inter alia*, the betterment of native Hawaiians. *Keaukaha-Panewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d 1467, 1471 (9th Cir. 1984). As the conditional conveyance of these certain lands was from sovereign to sovereign, Congress, in the Admission Act, did not deny any person of property without due process of law, in violation of the Fifth Amendment. As will be seen, the Congress has clarified that the underlying special relationship goes to all Native Hawaiians, not just those identified in the Admission Act.

A. As a Federal Statutory Matter, All Native Hawaiians Enjoy the Same Special Relationship With the Federal Government as Indians and Native Alaskans

As discussed, native Hawaiians, as a class of persons, are the beneficiaries of a public trust created by federal statutory law in Hawaii's Admission Act. While the state administers the trust, the trust relationship arises from a federally-created obligation, one that reflects a "special relationship" between the Hawaiian people and the federal government. There is no question but that this trust relationship is principally a *federal* one,[3] notwithstanding

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[3] If the state uses the trust (or its proceeds) for any purpose other than those enumerated in the Admission Act, it "shall constitute a breach of trust for which suit may be brought *by the United States*." Pub. L. 86-3, § 5(f) (emphasis added). As trust beneficiaries, native Hawaiians may also sue in *federal* court to remedy breaches of trust, *Keaukaha-Panewa Community Ass'n v. Hawaiian Homes Comm'n*, 739 F.2d at 1472, as the "trust obligation is rooted in federal law, and power to enforce that obligation is contained in federal law." *Id.*

that Congress both expressly (in the Admission Act) and impliedly (in subsequent acts) has delegated authority to Hawaii to carry it out. While petitioner argues that the Hawaiian people cannot be the subject of special treatment as a class of persons on the basis of their racial background, he does not challenge the federally-created public trust in this case. However, in his petition to this Court, he impliedly attacks the trust as allowing an impermissible racial classification, arguing that no "special relationship"exists between the Native Hawaiians and the State of Hawaii or the federal government. (Pet. 19-20, 39-45.) His argument ignores considerable federal statutory law on the subject, statutes that "reaffirmed the trust relationship which existed between the United States and the Hawaiian people." Native Hawaiian Education Act, Pub. L. 89-10, Title IX, § 9201(9), codified at 20 U.S.C. § 7902(9) (1994). Amici States believe the trust flows from and expresses a pre-existing "special relationship" between the federal government and Native Hawaiians and that Hawaii has acted constitutionally to fulfill the trust responsibilities given to it by the federal government in the Admission Act and subsequent acts.

Over time Congress has placed all Native Hawaiians in a special class for several significant purposes. Pre-statehood, Congress set aside 200,000 acres of public trust lands for long-term leases to "native Hawaiians," limiting the term as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." Hawaiian Homes Commission Act, 1920, § 201(7). While limited to Hawaiians of fifty percent blood quantum, Congress established thereby a fiduciary

trust obligation in the Hawaiian Homes Commission benefitting some number of the Hawaiian people as an aboriginal or indigenous people. Still pre-statehood, Congress in 1938, "acknowledged the unique status of the Hawaiian people" by providing for leases of certain federal lands for use and fishing " 'only by native Hawaiian residents . . . and visitors under their guidance.' " *See* 20 U.S.C. § 7902(9). As discussed above, the Admission Act required Hawaii to adopt the Hawaiian Homes Commission Act and administer the public lands trust, "but [Congress] *reaffirmed the trust relationship which existed between the United States and the Hawaiian people* by retaining the exclusive power to enforce the trust . . . " *Id.* (emphasis added). Congress also noted in the Native Hawaiian Education Act that it had earlier ceded to Hawaii certain lands "to be held by the State 'in public trust' and [Congress] *reaffirmed the special relationship which existed between the United States and the Hawaiian people* . . . " 20 U.S.C. § 7902(11) (emphasis added). As chronicled by the Brief of Hawaii and several amici, numerous acts of Congress subsequent to admission regularly recite and reaffirm the special relationship of the federal government with the Hawaiian people. As set forth there, in many of those federal statutes, Congress has extended special educational, health and other benefits to *all* Native Hawaiians.

There are two critically important consequences of Congress' subsequent actions in this field: first, it has made clear that *all* Hawaiian people, not just those with the fifty percent blood quantum, enjoy the special relationship with the federal government; and second, it has

made clear it exercises its authority in this field concomitant with its exercise of authority in Indian (and Native Alaskan) affairs. In acts such as the Native Hawaiian Education Act, 20 U.S.C. § 7902, Congress has declared the broad basis of its relationship with the broader class of Native Hawaiians to which the federal obligations flow:

> In recognition of the special relationship which exists between the United States and the Native Hawaiian people, the Congress has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo and Aleut communities under the Native American Programs Act of 1974 [42 U.S.C.A. § 2991 et seq.], the American Indian Religious Freedom Act [42 U.S.C.A. § 1996], the National Museum of the American Indian Act [20 U.S.C.A. § 80q et seq.], the Native American Graves Protection and Repatriation Act [25 U.S.C.A. § 3001 et seq.], and the Native American Languages Act [25 U.S.C.A. § 2901 et seq.].

20 U.S.C. § 7902(13) (emphasis added.). Recitation of a "trust relationship" and "historical and unique legal relationship" between the United States and all Native Hawaiians is repeated, recognized and reaffirmed in the Native Hawaiian Health Care Act, 42 U.S.C. § 11701. Leaving no question where it stands, Congress has declared the following:

> The authority of Congress under the United States Constitution to legislate in matters affecting the aboriginal or indigenous peoples of the United States includes the authority to legislate

> in matters affecting the native peoples of Alaska and Hawaii.

42 U.S.C. § 11701(17). Congress thus has declared all Native Hawaiians, like Indians and Native Alaskans, are possessed of a special relationship with the United States because of their history, culture, and the eventual cession of land and sovereignty.

B. The Federal Government's Special Relationship with the Hawaiian People Is Rooted in the Unique History of Hawaii and in Hawaiians' Cultural and Religious Customs, Beliefs, Practices and Language, Not in Racial Characteristics

Petitioner seeks to convince this Court that the rule in *Morton v. Mancari, supra*, 417 U.S. 535, is inapplicable to Native Hawaiians, where *Mancari* found the Indian preference in that case was a political, not a racial classification. He believes the *Mancari* Court found the classification was political because it relied on the formal tribal affiliation of Indians, i.e., "the preference at issue in *Mancari* was subject to rational basis review only because it applied 'to Indians not as a discrete racial group, but, rather, as members of quasi-sovereign tribal entities.' " Pet. 18, quoting *Mancari*, 417 U.S. at 554. Petitioner gets it only half right, undercutting his argument that *Mancari* is inapplicable to congressional action relating to the Hawaiian people.

It is true the *Mancari* Court relied upon the tribal affiliation of Indians who were the subjects of an employment preference within the Bureau of Indian Affairs

("BIA"). However, the Court explained the lower standard of scrutiny applied solely because the preference operated as an "employment criterion reasonably designed to further the cause of self-government and to make the BIA more responsive to the needs of its constituent groups." *Mancari*, 417 U.S. at 553-554. The Court continued: "[h]ere, the preference is reasonably and directly related to a legitimate, nonracially based goal. This is the principal characteristic that generally is absent from proscribed forms of racial discrimination." *Id.* In other words, it is the fact that the employment preference was in the BIA, the agency which "governs" the lives and activities of this "group of people," which was determinative of the Court's conclusion. The positions in the BIA subject to the preference involve the administration of "functions or services affecting any Indian *tribe*." *Id.*, at 537-38 (emphasis added). The "nonracially based" goals of the BIA employment preference were designed to further the cause of tribal self-government; indeed, it is because the employment positions concerned functions and activities that related only to *tribal governance* that tribal members were the subject of the preference.

The special treatment of Native Hawaiians under the trusts established for their benefit is akin to the preferential treatment in *Mancari*, grounded in the status of a preexisting aboriginal and sovereign people. There is no need to require that Native Hawaiians be affiliated in "tribes" or be registered as members of "tribal governments" in order for them to enjoy a special relationship with the federal government. *See Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73, 83 (1977). Certainly, this case does not turn on the fact that Native Hawaiians do

not have a "tribal" style self-governing apparatus directly comparable to Indian tribes. What cannot be ignored is that Americans deprived them of self-governance in occupying Hawaii, transforming its government, and eventually toppling its last monarch. Native Hawaiians, like Indians and Native Alaskans, are the aboriginal and indigenous people of "conquered" lands, whose unique political and cultural history justifies legislative measures that recognize, and, in many cases, benefit them apart from all others in the United States. *United States v. Kagama*, 118 U.S. 375, 384-385 (1886).

In light of the unique history of Hawaii and repeated congressional declarations of a special relationship between the federal government and all Native Hawaiians, it is appropriate to say that the trusts established by Congress flowed from the prior sovereign status of aboriginal Hawaiians. The special relationship thus derives from inherently political, not racial, considerations. That conclusion is exemplified strikingly by the congressional recognition that the

> Native Hawaiian people are determined to preserve, develop and transmit to future generations their ancestral territory, and their cultural identity in accordance with their own spiritual and traditional beliefs, customs, practices, language and social institutions.

42 U.S.C. § 11701(2). This sounds little different than the foundation of American Indian or Native Alaskan identities; it is built principally of political, cultural, and social elements, not racial ones. That there is *some* recognition of "blood quantum" or ancestral descent is not fatal to Indian legislation. *See* 25 U.S.C. § 479 (the term "Indian"

includes "all other persons of one-half or more Indian blood".); *see also Morton v. Mancari*, 417 U.S. at 555, n. 24 (policy requires individual to be "one-fourth or more degree Indian blood . . . "). Nor should it be with legislation affecting the Hawaiian people.[4] The principal classification of Native Hawaiians is as an aboriginal people, a classification founded in history, conquest, deprivation of land and a unique culture and language. It is unavoidable that an aboriginal people identify themselves to some extent by ancestry and descent; but that is not what makes them the subject of the special relationship. As with Indians and Native Alaskans, it is their status as aboriginal people that forms the foundation of the relationship.

This Court should defer to Congress' special expertise in handling the affairs of aboriginal and indigenous people found throughout the United States. Congress, not the courts, is in the best position to ascertain the appropriate level of identification and connection between a people so as to constitute a special class and enjoy the special relationship – whether that be by descendency, legal and political circumstances or language and culture. Much as Congress has significant constitutional power to determine what constitutes a tribal or aboriginal group, *United States v. Candelaria*, 271 U.S. 432, 439-41 (1926), *United States v. Sandoval*, 231 U.S. 28, 46 (1913), *United States v. McGowan*, 302 U.S. 535, 539 (1938), the Court

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[4] It should be noted that the voting restriction in this case imposes no blood quantum requirement; one need only be a descendant of the aboriginal people. Haw. Const., Art XII, § 5; Haw. Rev. Stat. § 10-2.

should look to Congress to determine the appropriate criteria that qualify a people as aboriginal or indigenous. *See also United States v. John*, 437 U.S. 634 (1978). Its expertise and judgment is particularly relevant to the Hawaiian experience, as the United States has acknowledged complicity in overthrowing the Kingdom of Hawaii and taking territory and power from its sovereign citizens, including the aboriginal people of that Kingdom. *See* Apology Resolution, Pub. L. 103-150, 107 Stat. 1510 (1993).

C. Congress Has Ratified Hawaii's Own Acts Furthering the Trust Responsibility

Not only has Congress expressly delegated authority to Hawaii to administer the trust responsibility to native Hawaiians, as found in the Admission Act, Congress has also moved to ratify Hawaii's own actions taken to further the purposes of the federal trust responsibility to all Hawaiian people.

In 1978, Hawaii, through its Constitutional Convention, amended its constitution, accomplishing two objectives relating to the Hawaiian people. One amendment affirmed that the State holds ceded lands as a public land trust for "native" Hawaiians (as defined in the Hawaiian Homes Commission Act) and the general public. Another amendment established the Office of Hawaiian Affairs (OHA) to hold title to "all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians.

There shall be a board of trustees for the Office of Hawaiian Affairs elected by qualified voters who are Hawaiians."[5] Hawaii Constitution, art. XII, sec. 5. The application of the trust to "Native Hawaiians," or "Hawaiians," was to bring the state "in line with the current policy of the federal government to extend benefits to all Hawaiians regardless of blood quantum." Proceedings of the Constitutional Convention of Hawaii of 1978, Vol. 1 Journal and Documents (Hawaiian Affairs Committee), p. 647. Hawaii, thus, acted in 1978 to conform its understanding of the federal trust responsibility by extending its obligations to *all* Native Hawaiians under OHA's guardianship. While OHA is careful to ensure that funds derived from § 5(f) lands go only to programs that benefit the more limited group of "native Hawaiians," other funds raised or collected by OHA are used to benefit the broader group of "Native Hawaiians," the subject of the federal statutory trust responsibility.

In turn, Congress has since expressly ratified OHA's activity in several statutes as set forth in the appendix of the Brief of Amicus Office of Hawaiian Affairs, et al. These statutes appropriate federal funds to OHA, delegate authority to OHA and require consultation with OHA. In appropriating for benefits and loan programs for Native Hawaiians, Congress has accommodated to OHA's programs and procedures. This congressional ratification of OHA undoubtedly serves as an implied delegation of authority to OHA to act as trustee for its broadly defined set of beneficiaries, namely, *all* Native

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[5] For the meaning of the term "Hawaiian" under state law, see n.1.

Hawaiians. In short, Hawaii acted to bring itself "in line" with federal policy extending benefits to all Hawaiians regardless of blood quantum, and Congress, in turn, ratified Hawaii's actions conforming to the congressional understanding of the federal trust responsibility to all Native Hawaiians. This Court should recognize the profoundly consonant nature of these federal and state actions, affirm the delegations implicit in them, and uphold Hawaii's constitutional and legislative measures as fulfilling legitimate constitutional federal objectives.

D. Hawaii May Voluntarily Assume Responsibilities to Further the Federal Trust Relationship.

Finally, amici States believe Hawaii may assume responsibilities on its own in this field. A State should be able to provide for special treatment to its aboriginal people provided its actions are not preempted by federal legislation or implication and they are "rationally tied to the fulfillment of Congress' unique obligation[s]" to native peoples. *Mancari*, 417 U.S. at 555. When the States entered into the Union, they did so with their sovereignty intact. *Blatchford v. Native Village of Noatak*, 501 U.S. 775, 779 (1991). Implicit in that sovereignty is the power of a state to act on its own in an area of federal responsibility where not preempted. While the power of the federal government in Indian affairs under the Constitution, Article I, section 8, clause 3 (Indian Commerce Clause), is "plenary," *see Alaska v. Native Village of Venetie Tribal Gov't.*, 522 U.S. 520, 531, n. 6 (1998), nothing suggests the power is exclusive. Indeed, this Court stated:

> The upshot has been the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law.

Mescalero Apache Tribe v. Jones, 411 U.S. 145, 148 (1973), citing *Organized Village of Kake*, 369 U.S. at 75; *Williams v. Lee*, 358 U.S. 217 (1959); *New York ex rel. Ray v. Martin*, 326 U.S. 496, 499 (1946); and *Draper v. United States*, 164 U.S. 240 (1896). In *New York ex rel. Cutler v. Dibble*, 62 U.S. (How.) 366 (1859), this Court upheld the state's law *protecting* Indians, noting it was not contrary to a federal treaty with the tribe or any other federal law.

This Court should re-affirm the principle that states may enact laws or take actions that further the federal responsibilities where such laws or actions are not in conflict with federal law. As such, state action does not offend federal plenary power and effects good public policy.

Where such state actions are "rationally tied to the fulfillment of Congress' unique obligation[s]" to native people, *Mancari*, 417 U.S. at 555, they do not run afoul of the Equal Protection Clause of the Fourteenth Amendment, much as similar federal action does not deprive any individual of due process under the Fifth Amendment. *See McClananhan v. Arizona State Tax Comm'n*, 411 U.S. 164, 177 (1973). As noted in the appendix to the Brief of the Amicus Hawaii Congressional Delegation, numerous states voluntarily assume certain limited obligations to

benefit Indians within their state; such laws and programs should be seen as furthering the special relationship between the federal government and Indians.

Hawaii's actions in amending its Constitution to provide for the OHA and its programs to benefit all Native Hawaiians are not contrary to any federal statutory law relating to Native Hawaiians or to the federal trust responsibility. In fact, the state constitutional provisions and laws further the federal trust responsibility, as Congress repeatedly has acknowledged in legislation, appropriations and statutory ratifications of OHA and its charge.

II. HAWAIIAN LAWS SUSTAINING NATIVE HAWAIIANS, LIKE FEDERAL LAW PROTECTING AMERICAN INDIANS AND NATIVE ALASKANS, DO NOT VIOLATE THE EQUAL PROTECTION GUARANTEES OF THE FOURTEENTH AMENDMENT

Petitioner contends that this Court's decisions in *Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995), and *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989), require invalidation of the trustee election laws for OHA, as a race-based scheme. In *Adarand*, this Court ruled that "[A]ll racial classifications, imposed by whatever federal, state or local government actor, must be analyzed by a reviewing court under strict scrutiny." *Adarand*, at 227; *also Croson*, 488 U.S. at 496-97; *Shaw v. Reno*, 509 U.S. 630, 644 (1993). Further, this Court has ruled that "such classifications are constitutional only if they are narrowly tailored measures that further compelling governmental interests." *Adarand*, at 227.

Amici States submit that the OHA trustee elections, and the actions taken by Hawaii to further the purposes of the federally-created and -ratified trust, are not racial classifications of the type prohibited by *Adarand* and *Croson*. Given the "special relationship" between the federal government, which mandated and expanded a trust relationship, and the Native Hawaiians, the proper management of the trust obligation requires actions that benefit the class of persons designated as the beneficiary – all Native Hawaiians. That class, as discussed above, is not a racial one, but a more complex classification that recognizes the unique historical circumstances relating to an aboriginal and indigenous people, who were deprived of their land and sovereignty. More akin to *Mancari*, the trustee election scheme is designed to be "more responsive to the needs of its constituent group[ ]." *Mancari*, 417 U.S. at 554. The restriction on the electorate in the OHA trustee elections serves a nonracially based goal – that of confining trust matters to those, who, like the BIA employees in *Mancari*, are most concerned with the activities and functions of the trust. Given the special relationship of all Native Hawaiians to the federal government and the federally-created trust relationship under federal statutory law, the trustee election scheme should be analyzed under the standard in *Mancari*, not *Adarand* – i.e., whether it is "tied rationally to the fulfillment of Congress' unique obligation[s]," in this case to Native Hawaiians, much like Indians in *Mancari*. 417 U.S. at 555. Here, the trustee election scheme definitely is tied to fulfilling Congress' unique obligation – one that runs to *all* Native Hawaiians – as it provides for Hawaiians to elect the trustees of a trust established for their own

betterment. This Court should adopt the *Mancari* standard as to all that flows from the trust for all Native Hawaiians and affirm the decision below.

CONCLUSION

For the reasons stated here, the judgment of the Court of Appeals should be affirmed on the issues presented.

Respectfully submitted,

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(13)

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IN THE

Supreme Court of the United States

HAROLD F. RICE, *Petitioner*,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAI'I, *Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF THE OFFICE OF HAWAIIAN AFFAIRS, KA LAHUI, THE ASSOCIATION OF HAWAIIAN CIVIC CLUBS, COUNCIL OF HAWAIIAN ORGANIZATIONS, NATIVE HAWAIIAN CONVENTION, NATIVE HAWAIIAN BAR ASSOCIATION, NATIVE HAWAIIAN LEGAL CORPORATION, NATIVE HAWAIIAN ADVISORY COUNCIL, HA HAWAI'I, HUI KALAI'AINA, ALU LIKE, INC., AND PAPA OLA LOKAHI AS *AMICI CURIAE* SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether the State of Hawai`i, having established the Office of Hawaiian Affairs as a trust to benefit descendants of the aboriginal Hawaiians pursuant to congressional delegation, ratification, and its own inherent power, may, consistently with the Fourteenth and Fifteenth Amendments to the Constitution of the United States, provide that the trustees shall be elected by the beneficiaries of the trust.

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INTEREST OF THE AMICI

The *Office of Hawaiian Affairs* (OHA) was established by amendment to the Hawai`i Constitution to hold title to property "set aside or conveyed to it...in trust for native Hawaiians and Hawaiians." Haw. Const. art. XII, § 5. The issue in this case is whether Hawai`i's determination that members of OHA's Board of Trustees should be elected by the beneficiaries of the OHA trust is consistent with the U.S. Constitution. OHA's interest in the outcome of this case is thus direct and fundamental. Because OHA is "a separate entity independent of the executive branch," Haw. Rev. Stat. § 10-4, with its own litigating authority, it is authorized to state its own views in this litigation.[1] OHA's brief is joined in by the following additional Native Hawaiian organizations:

*Ka Lahui Hawai`i*, a native initiative for self-determination comprising more than 20,000 citizens residing in Hawai`i and several other States;

The Association of Hawaiian Civic Clubs, a coalition of 47 clubs in Hawai`i and five other states (Alaska, California, Colorado, Nevada, and Utah) to promote the culture, spirit, attitudes, and values of the Native Hawaiian people;

The Council of Hawaiian Organizations, an association of registered Native Hawaiian organizations that work together to better conditions of Native Hawaiians and to educate the general public on issues of concern to Native Hawaiian organizations;

The Native Hawaiian Convention, a non-profit entity comprising native delegates who are considering issues of self-determination;

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[1] The parties have consented to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

The Native Hawaiian Bar Association, a non-profit organization affiliated with the Hawai`i State Bar Association designed to provide a forum to educate lawyers, the legal community, and the general public on issues of importance to the Native Hawaiian community;

The *Native Hawaiian Legal Corporation* (NHLC), a non-profit public-interest law firm incorporated in 1974 to assert, protect, and defend Native Hawaiian rights;

The *Native Hawaiian Advisory Council* (NHAC), a non-profit organization committed to legislative, administrative, and judicial advocacy of Native Hawaiian cultural, water, gathering, and language rights;

Ha Hawai`i, a non-profit corporation established to promote self-governance among the Native Hawaiian people;

Hui Kalai'aina, a non-profit corporation established to promote a greater understanding of historic and contemporary Native Hawaiian political issues;

Alu Like, Inc., a private, statewide, multi-service community-based non-profit agency assisting Native Hawaiians in their efforts to achieve social and economic self-sufficiency;

Papa Ola Lokahi, a nonprofit organization that addresses the health needs of Native Hawaiians.

Each of the *amici* has an interest in supporting the continuation of OHA, which has worked well for two decades.[2]

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[2] We use the term "Native Hawaiian" in its common usage and as it is used in dozens of federal statutes to refer to the descendants of the inhabitants of the Hawaiian Islands in 1778. When we refer to the more restrictive definition in the Hawaiian Homes Commission Act of 1920 (HHCA), ch.42, 42 Stat. 108, *reprinted at* Haw. Rev. Stat. § 101 *et seq.*, which originally required a 50%-blood quantification (subsequently modified to 25% for heirs), we use the lower case "native" Hawaiian as used in the HHCA, and make reference to that Act.

STATEMENT

a. *Introduction.* Petitioner bases his entire argument on the proposition that he has been denied a right to vote because of his race. That is not so. From its earliest days, the United States has recognized special rights in its aboriginal peoples based on the fact that they once owned and governed the lands that are now the United States. Protection of these rights has been one of the redeeming facts of American history and one of the great achievements of this Court. Such rights are a function of historical relationship to the land, not race.

This case concerns a limited program established by the State of Hawai`i, pursuant to authority delegated by Congress and the State's own power, to assist the indigenous people of Hawai`i by returning to them a small portion of the benefits of the land they lost. The State of Hawai`i – the only State in the Union *required* as a condition of its admission as a State to maintain a program for the benefit of its aboriginal people – created the Office of Hawaiian Affairs as a trust in 1978 through an amendment to the State's Constitution approved by a vote of all its citizens. OHA has now been in existence for more than 20 years, and Congress has repeatedly recognized and ratified its existence. *See infra* pp. 11-13.

This case thus does not involve racial discrimination, but the power of Congress and the State of Hawai`i to fashion a limited program for the aboriginal people of Hawai`i, similar to programs established to benefit aboriginal peoples in other States. The decisions of the courts below upholding that program should be affirmed by this Court.

b. *Hawai`i Before Annexation.* The Hawaiian Islands were settled by Polynesians more than 1000 years before the first Europeans arrived. They established a society and governed the Hawaiian Islands; their descendants are now referred to as "Native Hawaiians." Polynesians who live in Hawai`i today (*i.e.*, Tongans and Samoans) but are not descendants of the aboriginal people are not "Native Hawaiians" and are not beneficiaries of the OHA trust. "Native Hawaiian" is thus not a reference to a racial group, but rather to the descendants of the people who lived in and governed the Hawaiian Islands prior to Western contact.

Prior to the arrival of Europeans, the Islands supported a population estimated at between 300,000 and 800,000 people. A well-developed system of land use was in effect, with chiefs (*Mo`i*) and sub-chiefs (*Ali`i*) responsible for keeping the lands productive, and the larger class of farmers (*maka`ainana)* living and working on the land. Land was not bought and sold, but was redistributed among the *Mo`i* and *Ali`i* as a result of succession or war, without much effect on the *maka`ainana*, who continued to farm it and provide a portion of the proceeds to their chiefs.[3]

Hawai`i was "discovered" by Captain James Cook on January 18, 1778. In that era (the time of the adoption of the United States Constitution), the word "Indian" was applied to natives of Hawai`i as well as to natives of what is now the continental United States. Cook, as one historian reports, "spent several years among the savages of the Pacific, 'Indians,' as he and everyone else called them."[4]

From 1795 through 1819 a single *Mo`i*, Kamehameha I, unified the Islands, and established a native government that evolved into a constitutional monarchy. The United States entered into treaties and conventions with these monarchs in 1826, 1842,

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[3] This Court has referred to the Hawaiian land system in *Damon v Territory of Hawaii*, 194 U.S. 154 (1904), *Carter v Territory of Hawaii*, 200 U.S. 255 (1906), and *Kaiser Aetna v. United States,* 444 U.S. 164, 166-67 (1979); *see also* Melody K. MacKenzie, *Native Hawaiian Rights Handbook*, ch. 1 (1991) [hereinafter "Historical Background"]; 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 1-12 (1938); Lilikala Kame`eleihiwa, *Native Land and Foreign Desires* 25-33 (1992); Jon Chinen, *The Great Mahele* (1958).

[4] Gavan Daws, *Shoal of Time, A History of the Hawaiian Islands* 2 (1968); *see also id.* at 19, 23, 52. Multiple references in logs and diaries of Captain Cook and his officers refer to the indigenous people they found in the Hawaiian Islands as "Indians." Cook wrote that his first mate "attempted to land but was prevented by the Indians coming down to the boat in great numbers." J.C. Beaglehole, *The Journal of Captain James Cook on His Voyages of Discovery III* 267 (1967). David Samwell, the surgeon on Cook's flagship *Discovery* wrote, "The Indians opened and made a lane for the Marines to pass." *Id.* at 1161.

1849, 1875, and 1887. *See* Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. 103-150, 107 Stat. 1510 (1993) [hereinafter "1993 Joint Resolution"]. Native Hawaiians were thus organized as a nation or tribe as much as any native group of North America.

During the 19th Century, Americans and English came to the Islands in increasing numbers, first for the sandalwood trade, then whaling, then as missionaries, then for sugarcane and pineapple plantations. Beginning in 1848, Kamehameha III, at the urging of missionaries and European and American business interests, participated in a process known as the Mahele (division). The Mahele granted land permanently to the principal *Ali`i* in trust for the people, and later provided that the people could obtain title to individual tracts of land they farmed. The people were to receive a third of the land shared, but they actually received much less. For the first time, non-Hawaiians ("*haole*") were allowed to purchase land.

The Mahele opened the way to the same massive loss of native land that occurred among Indians in North America. There was also a devastating loss of population as Hawaiians, like other aboriginal peoples, succumbed in great numbers to small pox and childhood diseases.

As native population and power diminished, the American-owned plantation economy flourished, and Native Hawaiian land ownership decreased dramatically.

> The 1890 census, the last taken before the overthrow of Hawaii's monarchy, revealed the extent to which land had been concentrated in American and European hands. Of a total population near 90,000, fewer than 5,000 actually owned land. Hawaiians, if they had any lands, owned small acreages.... The relatively small number of Westerners owned over a million acres.... The 1890 census also reflects the severe decimation of the Hawaiian population, which had dropped by two-thirds since the time of Western contact.

Historical Background, *supra* note 3, at 10.

c. *The Overthrow.* In January 1893, a committee of American planters and businessmen, with the active help of the United States Minister in Honolulu and the United States Navy, overthrew the Kingdom of Hawai`i. On December 18, 1893, President Cleveland reported to Congress that a "substantial wrong has...been done which a due regard for our national character as well as the rights of the injured people requires we should endeavor to repair." *See* 1993 Joint Resolution. But the President's call for the restoration of the Hawaiian monarchy was not heeded. In 1898, although the two-thirds Senate majority needed for annexation by treaty could not be obtained, Hawai`i was annexed to the United States by a joint resolution of Congress.[5] One hundred years later, in the 1993 Joint Resolution, Congress acknowledged that the 1893 overthrow of the Kingdom of Hawai`i was "illegal," and that as a result of the overthrow the United States assumed control over some 1.8 million acres of Kingdom lands "without the consent of or compensation to the Native Hawaiian people of Hawaii or their sovereign government" and deprived the Native Hawaiians of their "rights...to self-determination." 1993 Joint Resolution, *supra*, Findings and § 1(3).

d. *Hawai`i as a Territory.* Congress established a territorial government for Hawai`i in 1900. *See* Act of April 30, 1900, ch. 339, 31 Stat. 141, 159. Under the Act, the President of the United States appointed the Governor. A local legislature was created, but Congress retained the power to amend or invalidate any territorial law. *See* Act of April 30, 1900, §§ 55, 66, 69. Except for land used by the United States for military and other purposes, the 1.8 million acres of royal lands received by the United States at the time of annexation "remain[ed] in the possession, use, and control of the government of the Territory of Hawaii." Act of April 30, 1900 § 91.

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[5] *See* 1 W. Willoughby, *The Constitutional Law of the United States* § 239, at 427 (2nd ed. 1929); Douglas W. Kmiec, *Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea*, 1 Territorial Sea J. 1, 19-21 (1990).

Queen Lili`uokalani, the last Hawaiian monarch, brought suit in the Court of Claims for the loss of the royal lands. The Court of Claims held that the Queen's lands were not her private property, but instead were part of the public lands of Hawai`i. *See Liliuokalani v. United States*, 45 Ct. Cl. 419 (1910). The Court of Claims relied on an earlier case, *In re Estate of Kamehameha IV*, 2 Haw. 715 (1864), which had held that the King's land "was not his private property...[but] belonged to the chiefs and people in common." *Liliuokalani*, 45 Ct. Cl. at 425.

e. *The Hawaiian Homes Commission Act.* By the early 1900s the Native Hawaiians' plight had become desperate. *See* Daws, *supra* note 4, at 291, 296-97. Congress responded by enacting the Hawaiian Homes Commission Act of 1920, ch. 42, 42 Stat. 108 (1921) [hereinafter HHCA]. The HHCA set aside about 200,000 acres out of the 1.8 million acres of Kingdom lands to provide residences and farm lots for native Hawaiians. The HHCA, as ultimately enacted, restricted benefits to "native Hawaiian[s]," defined as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian islands previous to 1778." HHCA, ch. 42, § 201(7), 42 Stat. 108 (1921).

As originally introduced, the bill would have provided farm sites to all Native Hawaiians without regard to blood quantum. Senator Smoot, the sponsor of the legislation, explained that "[t]he beneficiaries under the bill are not only Hawaiians but...all who have Hawaiian blood in their veins.... [W]hat we are trying to do is...to say that these lands that were the King's lands ought to have originally gone to these people...that were the subjects of, that King." *Hawaiian Homes Commission Act: Hearings Before the Senate Comm. on the Territories*, 66th Cong. 16-17 (1920). The Hawaiian legislature endorsed the bill as originally introduced, but the plantation owners opposed it. *See id.* at 12.

The plantation owners took the position that only "Hawaiians of the pure blood" should receive land. *Id.* at 15. Because pure-blooded Hawaiians were no longer a numerous group, such a limitation would make more public land available for lease to the plantation owners. *See id.* at 27-29.

Secretary of the Interior Lane testified that the legislation was justified by the history of the Islands and the "moral obligation" of

the United States to care for "people whose islands have come to us." *Organic Act of the Territory of Hawaii: Hearings on the Rehabilitation and Colonization of Hawaiians and Other Propcsed Amendments Before the House Comm. on the Territories*, 66th Cong. 129-30 (1920). Representative Curry, the Chairman of the Committee, said: "[T]he Indians received lands to the exclusion of other citizens. That is certainly in line with this legislation, in harmony with this legislation." *Id.* at 169. In response to a question about whether Native Hawaiians differed from other groups of Indians because "we have no government or tribe or organization to deal with," Chairman Curry said, "[w]e have the law of the land of Hawaii from ancient times right down to the present where the preferences were given to certain classes of people." *Id.* at 170.

The legislative report that accompanied the HHCA described in dramatic terms the Native Hawaiians' loss of their land, their poverty, and their high death rate. *See* H.R. Rep. No. 839 (1920). The Report quoted Interior Secretary Lane's description of Native Hawaiians as "our wards...for whom in a sense we are trustees." *Id.* at 4. The Report concluded: "In the opinion of your committee there is no constitutional difficulty whatever involved in setting aside and developing lands of the Territory for native Hawaiians only," referring to the "numerous congressional precedents for such legislation in previous enactments granting Indians and soldiers and sailors special privileges in obtaining and using the public lands." *Id.* at 11.

Ultimately Congress adopted a compromise defining "native Hawaiian[s]" eligible to participate in the program as "any descendant of not less than one-half part of the blood of the races inhabiting the Hawaiian Islands previous to 1778." HHCA, ch. 42, 42 Stat. 108 (1920), *reprinted at* Haw. Rev. Stat. § 101 *et seq.*

f. *Hawai`i as a State.* In the 1959 Act admitting Hawai`i to the Union, Congress required the new State of Hawai`i to accept responsibility for the Hawaiian Home Lands as a condition of statehood. *See* Pub. L. No. 86-3, § 4, 73 Stat. 4 (1959); HHCA, ch. 42, § 201(7), 42 Stat. 108 (1920). This was in marked contrast to legislation admitting other States, which typically has required the State to *disclaim* any responsibility for lands held in trust for

Native Americans.[6] To date, Hawai`i is the only State *required* by Congress as a condition of statehood to assume a trust responsibility for its aboriginal peoples. The Admission Act further conveyed 1.2 million acres to the new State[7] and required that these lands be held in trust and used for five broad purposes, including "the betterment of the conditions of the native Hawaiians, as defined in the Hawaiian Homes Commission Act." 1959 Admission Act, Pub. L. No. 86-3, § 5(f), 73 Stat. 4. Thus Congress not only required Hawai`i to maintain the Hawaiian Home Lands as a condition of statehood, but authorized it to use revenues from the other public lands for the benefit of native Hawaiians as defined in the HHCA, as well as for other public purposes.[8]

In the 1970s Congress broadened its definition of Native Hawaiians by including Native Hawaiians in legislation concerning Native Americans, and by consistently defining "Native Hawaiian" as "any individual any of whose ancestors were natives of the area which consists of the Hawaiian Islands prior to 1778."[9]

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[6] *See e.g.*, Act of February 22, 1889, ch. 180, § 4, 25 Stat. 676 (requiring the States of North Dakota, South Dakota, Montana and Washington to disclaim jurisdiction over Indian lands); *see also infra* p. 19 (discussing similar language in the Alaska Statehood Act).

[7] The federal government has retained about 400,000 acres for military and national park purposes.

[8] The five stated purposes are: "for the support of the public schools and other public educational institutions, for the betterment of the conditions of native Hawaiians, as defined in the Hawaiian Homes Commission Act, 1920, as amended, for the development of farm and home ownership on as widespread a basis as possible[,] for the making of public improvements, and for the provision of lands for public use." Admission Act of 1959, Pub. L. No. 86-3, § 5(f), 73 Stat. 4.

[9] *See* Headstart, Economic Opportunity, and Community Partnership Act of 1974, Pub. L. 93-644, § 813(3), 88 Stat. 2291, 2327; Youth Employment and Demonstration Projects Act of 1977, Pub. L. 95-93, § 303(e)(16), 91 Stat. 627, 650; Comprehensive Employment and Training Act Amendments of 1978, Pub. L. 95-524, 92 Stat. 1909; The (...continued)

g. *The 1978 Hawaiian Constitutional Amendments.* By 1978 it was apparent that the HHCA was in need of supplementation. The HHCA's definition of native Hawaiian was anachronistic, and the best lands were leased to the plantation interests to generate funds to administer the Act.[10] Moreover, the Hawai`i Legislature had not used any revenues from the additional lands transferred pursuant to the Admission Act for the benefit of Native Hawaiians. *See* Historical Background, *supra* note 3, at 19.

The delegates to Hawai`i's 1978 Constitutional Convention proposed a series of amendments concerning Native Hawaiians which were subsequently adopted by a vote of all Hawai`i's citizens at the November 1978 general election. One of the amendments affirmed that the State holds the ceded lands as a Public Land Trust with two named beneficiaries: native Hawaiians as defined in the HHCA and the general public.[11] *See* Haw. Const. art. XII, § 4. A second amendment created OHA to "hold title to all the real and personal property now or hereafter set aside or conveyed to it which shall be held in trust for native Hawaiians and Hawaiians" and provided for establishment of a board of trustees to be elected by qualified voters who are beneficiaries of the trust. *Id.* art. XII, § 5.

The records of the 1978 Constitutional Convention explain why OHA was created as a trust, and why its beneficiaries were to elect the trustees. The Convention's Hawaiian Affairs Committee was

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National Parks and Recreation Act of 1978, Pub. L. 95-625, § 505(e), 92 Stat. 3467.

[10] *See* Hawaii Advisory Committee to the United States Commission on Civil Rights, *A Broken Trust, The Hawaiian Homelands Program: Seven Years of Failure of the Federal and State Governments to Protect the Civil Rights of Native Hawaiians* (1991).

[11] *See generally* Historical Background, *supra* note 3, at 19-20; Jon Van Dyke, *The Constitutionality of the Office of Hawaiian Affairs*, 7 U. Haw. L. Rev. 63 (1985); Noelle M. Kahanu & Jon M. Van Dyke, *Native Hawaiian Entitlement to Sovereignty: An Overview*, 17 U. Haw. L. Rev. 427, 446-51 (1995); Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Policy Rev. 95, 104-10 (1998).

"strongly of the opinion that people to whom assets belong should have control over them." Comm. Rpt. No. 59, 1 *Proceedings of the Constitutional Convention of Hawai`i of 1978* at 644. "[S]uch participation will avoid the much-justified criticism which has been directed at the Hawaiian Homes Commission for, among other things, its inability to respond adequately to the needs of native Hawaiians of one-half blood." *Id.* OHA thus was created in part to provide Native Hawaiian people with a political entity for "self determination and self government." Comm. of the Whole Rpt. No. 13, *id.* at 1019.[12]

The beneficiaries of the trust included all people whose ancestors were natives of the area that consisted of the "Hawaiian Islands previous to 1778." *Id.* at 647. The Committee found that the half-blood requirement

> has proved to be a factor in dividing the Hawaiian community – mothers and fathers from their children, cousins from cousins, friends from friends. Moreover, the removal of a blood qualification will be in line with the current policy of the federal government to extend benefits for Hawaiians to all Hawaiians regardless of blood quantum.

Id.

h. *The Office of Hawaiian Affairs.* The OHA trust is a "body corporate[,]...a separate entity independent of the executive branch." Haw. Rev. Stat. § 10-4. Hawai`i's Supreme Court has described OHA as a "self-governing corporate body." *Trustees of the Office of Hawaiian Affairs v. Yamasaki*, 737 P.2d 446, 451 (Haw. 1987). OHA has the usual powers of a trust or corporation to sue and be sued and enter into contracts in its own name. Haw. Rev. Stat. § 10-4.[13] Although OHA elections are held concurrently

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[12] *See* Melody K. MacKenzie, *Native Hawaiian Rights Handbook* 89 (1991) ("The electoral process for choosing the board of trustees ensures OHA's independence .... [T]he creation of the Office of Hawaiian Affairs is a step toward self-governance.").

[13] Because of its independent trust status, OHA is authorized to sue the State to protect the interest of OHA beneficiaries, and on occasion has (...continued)

with State elections to maximize voter turnout and conserve OHA's funds, OHA has at times conducted separate balloting by mail, paid for with OHA funds, to determine the views of its beneficiaries on particular issues.[14]

The Hawai`i Legislature, as permitted by the Hawai`i Constitution, art. XII, § 6, has allocated a share of income from the Hawai`i ceded lands to OHA for the betterment of the conditions of native Hawaiians as defined in the HHCA. Each year, the Legislature has also provided OHA with additional funds for the use of Native Hawaiians defined without regard to blood quantum. Both types of funds are made available to OHA by vote of legislators elected by all citizens of Hawai`i. OHA receives additional funds from Congress for "Native Hawaiians" defined without regard to blood quantum, and also receives funds from private parties. OHA has used these funds to facilitate agricultural development in Native Hawaiian communities, to provide training for Native Hawaiians in a wide variety of business fields, to assist Native Hawaiian entrepreneurs by providing loans for economic initiatives, to address the health needs of Native Hawaiians, to support the construction of housing for Native Hawaiians on the Hawaiian Homelands and elsewhere, to promote the use of the Hawaiian language by funding immersion programs for students, and to work with governmental and non-governmental bodies to support the needs of Native Hawaiians. *See Waiwai Ho`omau–Perpetuating the Trust*, Fiscal 1998 Annual Report for the Office of Hawaiian Affairs (1998).

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done so. *See Office of Hawaiian Affairs v. State of Hawai`i*, No. 20281 (Haw. Sup Ct. appealed 1997) (concerning revenues from Duty Free Shops); *Office of Hawaiian Affairs v. Housing Fin. Dev. Corp.*, Civ. No. 94-4207-11 (Haw. 1st. Cir. filed 1994) (seeking to prevent the State from transferring ceded lands it holds in trust).

[14] In 1998, 100,163 persons of Hawaiian ancestry were registered to vote for the Trustees of the OHA, and 64,806 persons actually cast ballots at the general election. *See Index of Elections* (visited July 25, 1999) <http://www.state.hi.us/elections/reslt98/general/98swgen5.html>.

i. *Congressional Ratification.* As noted above, Congress began to include "Native Hawaiians," defined without reference to blood quantum, in federal legislation providing benefits for American Indians prior to the establishment of OHA. Congress has also used this broader definition in at least 25 laws enacted since Hawai`i's 1978 Constitutional Convention.[15] For example, the Native Hawaiian Education Act of 1994, 20 U.S.C. §§ 7901-12, using the broader definition, explicitly finds that "Native Hawaiians are a distinct and unique indigenous people," that the United States apologized in 1993 for "the deprivation of the rights of Native Hawaiians to self-determination," and that "Congress affirmed the special relationship between the United States and the Native Hawaiians." Moreover, at least eight Acts of Congress expressly refer to OHA.[16] These federal laws appropriate funds to OHA, delegate authority to OHA, and require consultation with OHA. For example, in the Administration for Native Americans Act, Congress named OHA as the recipient of federal funds to establish a revolving loan program for Native Hawaiian programs and individuals. *See* 42 U.S.C. § 2991b-1.

SUMMARY OF ARGUMENT

The words "Indians" and "Indian Tribes" in the Constitution encompass all the aboriginal peoples of the United States, whether East Coast Indians, Pueblos (who were full citizens of Mexico), Eskimos, other aboriginal peoples of Alaska, or Native Hawaiians. The Court has recognized that Congress has the power to choose which aboriginal peoples it will recognize and the form of its relationship with them. *See United States v. Sandoval*, 231 U.S. 28 (1913). Congress's powers with respect to Native Americans are not limited to members of recognized tribes, as shown by federal legislation dealing with Alaska Natives and decisions of this Court, such as *United States v. John*, 437 U.S. 634 (1978). By enacting

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[15] The laws are listed in Part 1 of the Appendix to this brief. *See also* the Appendix to the *amicus* brief of the Congressional Delegation.

[16] The laws are listed in Part 2 of the Appendix to this brief.

the HHCA, the Admission Act, and numerous Acts concerning Native Hawaiians, Congress has exercised its broad constitutional power to recognize aboriginal Hawaiians as among the aboriginal peoples of the United States and to establish special programs for them.

Allowing OHA's beneficiaries – Native Hawaiians – to elect the OHA trustees does not deny other citizens of Hawaii the right to vote "on account of race." Laws that recognize the special status of aboriginal people are not based on race, but the aboriginal peoples' ownership of land and self-government before Europeans took control of their lands. *See Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). The Civil War Amendments were not addressed to, and did not affect, Congress's power to recognize and deal specially with aboriginal peoples, as shown by many subsequent decisions of this Court. Federal legislation that is "reasonably designed to further the cause of Indian self-government" is thus constitutional, *Mancari*, 417 U.S. at 553-54, without regard to whether the Native Americans subject to the legislation are organized as tribes. *See John*, 437 U.S. at 653.

The Constitution allows Native Americans to exercise control over assets set aside for their benefit. Almost every Indian tribe has elections limited to tribal members although their decisions affect funds provided by Congress and impact non-Indians. Similarly, voting in Alaska Native corporations is limited to Alaska Natives although the corporations control vast funds and lands provided by Congress. The people of the State of Hawai`i did not exceed the bounds of the federal Constitution by amending the Hawai`i Constitution in 1978 to create OHA and provide for election of OHA's trustees by Native Hawaiians. Congress delegated substantial authority to Hawai`i by requiring the State to assume the federal government's responsibilities for aboriginal Hawaiians under the HHCA. In addition, Congress has ratified Hawai`i's creation of OHA by enacting statutes that define all descendants of aboriginal Hawaiians as Native Americans and by expressly referring to OHA in federal legislation. Furthermore, States have authority to legislate with respect to Native Americans within their borders, so long as the state law does not conflict with federal law or interfere with tribal self-government.

ARGUMENT

I. THE CONSTITUTION'S PROVISIONS ON INDIANS AND INDIAN TRIBES ENCOMPASS NATIVE HAWAIIANS.

Petitioner contends (Pet. Br. 22-29) that because the Native government of Hawai`i underwent many changes before it was overthrown, and because Hawai`i was a republic at the time it came into the United States, any laws supporting programs for Native Hawaiians – regardless of how defined – are unconstitutional. Petitioner's argument ignores (1) the historical context and purpose of the constitutional provisions concerning Indians and Indian tribes, (2) the broad authority of Congress, recognized by this Court, to establish a special relationship with aboriginal peoples of the United States, and (3) the long experience of the United States in providing varying programs and political structures for aboriginal peoples as their situations changed and new areas were added to the Nation.

A. The Constitution Permits Congress To Establish A Special Relationship With The Aboriginal Peoples Of The United States, Including Native Hawaiians.

The special relationship between Europeans and the aboriginal peoples of the Americas began while Columbus was still alive.[17] As a result of well publicized abuses during the early years of Spanish conquest, the King of Spain established a trust relationship

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[17] Bartolomé de Las Casas, a Dominican Monk who accompanied Columbus on his third voyage, publicized the destruction of the indigenous peoples, which led to the Spanish laws of Burgos of 1512-1513, the first European laws concerning the rights of indigenous peoples. By 1532 Francisco de Vitoria, a Spanish law professor, in a report commissioned by the King, rejected arguments that discovery, the divine right of kings, European Christianity, the power of the Pope, or native paganism made the aboriginal peoples any less than true owners of the lands they occupied. Vitoria's reasoning was followed by later writers and influenced American law. *See, e.g., Johnson and Graham's Lessee v. McIntosh*, 21 U.S. (8 Wheat.) 543, 562-71 (1823).

between the Crown and the indigenous peoples, a relationship often ignored but probably responsible for the survival of many native peoples in the Americas.[18] Later the English Crown and other European nations recognized the rights of indigenous peoples to land ownership and self-government. *See Cohen Handbook, supra* note 18, at 53. The Constitution assumes and provides a mechanism for the continuation of this policy.

The aboriginal peoples of the United States are referred to once in the Constitution as "Indians," *see* U.S. Const. art. I, § 2, cl. 3, and once as "Indian Tribes," *see* U.S. Const. art. I, § 8, cl. 3. This constitutional language is broad enough to encompass all the people who inhabited the land before the Europeans came. Of course, Native Americans were not from India, and therefore not literally "Indians." Nor were they all "tribes" in any sense beyond a group of people. Their forms of government varied from the Iroquois Confederation that provided one of the inspirations for a confederation of American states to villages of people living by a river.[19]

When the Constitution was written, Native Hawaiians fit easily within the ordinary meaning of "Indian" and "Indian Tribe." They were a group of aboriginal people with a common language, culture, and tradition, who governed their own land before the coming of Europeans. *See 1993* Joint Resolution, *supra*. There have been many changes since, but in this century Congress has repeatedly recognized Native Hawaiians as an aboriginal people with a special relationship to the United States. *See supra* pp:7-9,13. As we show below, this record of congressional action

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[18] *See* Felix S. Cohen, *The Spanish Origin of Indian Rights in the Law of the United States*, 31 Geo. L.J. 1 (1942); Felix S. Cohen, *Felix S. Cohen's Handbook of Federal Indian Law* 47-50 (2d ed. 1982) [hereinafter "*Cohen Handbook*"]; Tyler, *Spanish Laws Concerning Discoveries, Pacifications and Settlements among the Indians* (American West Center, Occasional Paper No. 17 1980).

[19] *See* Swanton, *The Indian Tribes of North America* 1-4 (Smithsonian Institution, Bureau of American Ethnology, Bulletin 145, Gov. Printing Office, 1952).

establishes the political status necessary to justify programs benefiting Native Hawaiians.

B. The Constitution's Provisions Concerning Indians And Indian Tribes Apply To Aboriginal Peoples Who Were Citizens Of Another Nation Before They Were Incorporated Into The United States.

The fact that Native Hawaiians were part of a constitutional monarchy that included non-Hawaiians does not deprive Congress of constitutional authority to recognize Native Hawaiians as an aboriginal people of the United States. This is demonstrated by the experience of the Pueblo people, who were full citizens of Mexico before coming into the United States but who were ultimately recognized by this Court as Indians entitled to the special protection of the United States.

In 1848, the United States acquired from Mexico what is now most of California, New Mexico, and Arizona and confirmed its title to Texas. In New Mexico, the Spanish had encountered indigenous villages (*pueblos*) in the late 1500s. By 1848 the Pueblos spoke Spanish, were Catholic, held land under Spanish land grants, and were full citizens of Mexico entitled to "the full recognition by that government of all their civil rights, including those of voting and holding office." *United States v. Joseph*, 94 U.S. 614, 617 (1876). In *Joseph*, the Court recounted these facts and held, as a matter of statutory construction, that the Pueblos were not "Indians" under an 1834 Act that prohibited non-Indians from settling on Indian lands.

In the 1910 New Mexico Enabling Act, however, Congress clearly declared Pueblo lands to be "Indian country." *See* Act of June 20, 1910, ch. 310, §§ 557, 558. Soon thereafter, a person arrested for selling liquor in Indian country contested Congress's power to so classify Pueblo land, since *Joseph* had held that the Pueblos were not Indians. In *United States v. Sandoval*, 231 U.S. 28 (1913), the Court faced the constitutional issue of who is an "Indian." Despite its prior holding in *Joseph*, the Court held that the Pueblos' prior full citizenship in Mexico (a multi-racial nation) did not remove them from the constitutional category of "Indian" if Congress chose to treat them as such. The Court concluded:

> [I]t is not necessary to dwell specially upon the legal status of this people under either Spanish or Mexican rule, for whether Indian communities within the limits of the United States may be subjected to its guardianship...turns upon other considerations. Not only does the Constitution expressly authorize Congress to regulate commerce with the Indian tribes, but long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States as a superior and civilized nation the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state.

Id. at. 45; *see also United States v Candelaria*, 271 U.S. 432 (1926) (again recognizing the United States' trust responsibility towards all the Pueblo people).

In *Sandoval*, it made no difference that the Pueblos owned their land in fee simple and were full voting citizens of Mexico. For constitutional purposes, it was sufficient that the Pueblos were the aboriginal people of part of what is now the United States, and that Congress chose to treat them as Indians. The same is true in Hawai`i. In enacting the HHCA, Congress recognized the aboriginal people of Hawai`i as part of the aboriginal people of the United States. Congress reaffirmed this status in the Admission Act and then broadened the definition of Native Hawaiian in dozens of laws enacted since Statehood. This Court in *Sandoval* held that, if Congress has recognized an aboriginal people, the Court should not substitute its judgment for the essentially political decision made by Congress.

C. The Constitution Does Not Require That Aboriginal Peoples Be Popularly Considered Indians Or Have A Functioning Tribal Government For Congress To Grant Them Special Rights.

It also makes no constitutional difference that the Native Hawaiians are not closely related to North American Indians or that the Native government in Hawai`i was overthrown in 1893.

This is demonstrated by federal legislation concerning Native Alaskans. Native Alaskans include Athabaskans, Aleuts, and Eskimos. Only Athabaskans are closely related to other North American Indians, and most Native Alaskans were not organized in tribes. The Federal Government has nevertheless treated Native Alaskans as a single politically identifiable group. For example, the Act of May 17, 1906, ch. 2469, 34 Stat. 197, authorizing the allotment of non-mineral lands, was applicable to "any Indian or Eskimo of full or mixed blood who resides in and is a native of said district...." [20] As in Hawai`i, no tribal affiliation or blood quantum was required.

The Alaska Statehood Act, unlike the Hawai`i Admission Act passed the next year, did not delegate to the State of Alaska any responsibility for native people, but instead required the State to disclaim all rights and title to "any lands or other property...which may be held by any Indians, Eskimos, or Aleuts (hereinafter called natives)." Act of July 7, 1958, Pub. L. 85-508, § 4, 72 Stat. 339. The Alaska Statehood Act thus makes plain that the United States was not dealing with "Indian tribes" in the narrow sense, but rather treated Indians, Eskimos, and Aleuts as a single politically identifiable group called "natives."[21]

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[20] *See also* Act of February 25, 1925, ch. 320, 43 Stat. 978 (authorizing the Secretary of the Interior to establish vocational training for the "aboriginal native people of the Territory of Alaska"); 1978 Fish and Wildlife Improvement Act, 16 U.S.C. § 712 (permitting the taking of migratory birds for subsistence "by the indigenous inhabitants of the State of Alaska") (discussed in *Alaska Fish & Wildlife Fed'n & Outdoor Council, Inc. v. Dunkle*, 829 F.2d 933, 940 (9th Cir. 1987), *cert. denied*, 485 U.S. 988 (1988)). *See generally Pence v. Kleppe*, 529 F.2d 135, 138-39 n.5 (9th Cir. 1976) ("In *United States v. The Native Village of Unalakleet*, 1969, 411 F.2d 1255, 188 Ct. Cl. 1 (1969), the Court of Claims...pointed out that the word 'Indian' is commonly used in this country to mean 'the aborigines of America.' We agree.").

[21] "Alaska Natives, including Eskimos and Aleuts, have been considered to have the same status as other federally recognized American Indians" even though "Alaskan Natives have not historically been organized into reservations or into tribal units." *Alaska Chapter, Associated Gen.*

(...continued)

In the 1971 Alaska Native Claims Settlement Act (ANCSA), Congress again treated the aboriginal peoples of Alaska and their descendants together as a single political group. Act of December 18, 1971, Pub. L. 92-203, 85 Stat. 688, 43 U.S.C. §§ 1601 *et seq.* ANCSA extinguished all "aboriginal titles...in Alaska based on use and occupancy," 43 U.S.C. § 1603(b), in exchange for "$962.5 million in state and federal funds and approximately 44 million acres of Alaska land." *Alaska v. Native Village of Venetie Tribal Gov't*, 118 S. Ct. 948, 949 (1998). Congress declared its policy that the settlement should be accomplished "with maximum participation by Natives in decisions affecting their rights and property," but without establishing tribes. 43 U.S.C. § 1601(b); *see also Native Village of Venetie*, 118 S. Ct. at 949.[22] To implement this policy, Congress required Natives to organize as corporations under state law. *See* 43 U.S.C. §§ 1606, 1607; *see Koniag, Inc. v. Koncor Forest Resource*, 39 F.3d 991 (9th Cir. 1994). Congress restricted voting rights in the corporations to Natives – initially for a period of 20 years and later in perpetuity. *See* 43 U.S.C. §§ 1606(h)(2) & (3)(D)(i), 1629c(d)(7)(A).

The structure of ANCSA closely resembles the OHA trust arrangement at issue in this case. In both Hawai'i and Alaska, government lands and funds have been dedicated exclusively for the benefit of native peoples in the State without respect to current tribal organization. In both cases, a structure was established to handle the lands and funds, and voting control over the use of the assets was vested in the native beneficiaries to the exclusion of other citizens. Neither program is properly regarded as racial. Both are based on the beneficiaries' aboriginal status as descendants of the original owners of the land. Both programs wisely provide that the beneficiaries have significant control over

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Contractors of Am., Inc. v. Pierce, 694 F.2d 1162, 1169 n.10 (9th Cir. 1982).

[22] A Native is defined as "a citizen of the United States...of one-fourth degree or more Alaskan Indian...Eskimo, or Aleute blood *** or who is regarded as an Alaska Native by the Native village or native Group of which he claims to be a member...." 43 U.S.C. § 1602(b).

the assets they receive. In neither program was an organized tribal government a prerequisite.

II. LIMITING VOTING FOR OHA TRUSTEES TO THE BENEFICIARIES OF THE OHA TRUST IS NOT A DENIAL OR ABRIDGMENT OF THE RIGHT TO VOTE ON ACCOUNT OF RACE.

A. Laws That Recognize The Special Status Of Aboriginal Peoples Do Not Classify On The Basis Of Race.

Congress's power to accord special political status to the aboriginal peoples of the United States necessarily implies that non-aboriginal peoples are not included in either the benefits or restrictions of aboriginal status. Both before and after the passage of the Civil War Amendments, this Court has upheld laws recognizing the special status of aboriginal peoples, invoking Congress's Treaty and War Powers, its power over public lands, the Indian Commerce Clause, and history. *See Worcester v Georgia*, 31 U.S. (6 Pet.) 515, 549-53 (1832) (Treaty Power); *Board of County Comm'rs of Creek County v. Seber*, 318 U.S. 705, 715 (1943) (War Power and Treaty Power); *Morton v. Mancari*, 417 U.S. 535, 552 (1974) (Indian Commerce Clause, Treaty Power, and War Power).

The Civil War Amendments were not intended to end this relationship, and have never been held to have done so. The Fourteenth Amendment expressly excludes "Indians not taxed" and applies only to persons "born or naturalized in the United States *and subject to the jurisdiction thereof*." U.S. Const. amend. XIV, §§ 1, 2 (emphasis added). It is clear that the drafters inserted these limitations to avoid granting immediate equal rights to Indians.[23] Similarly, the Fifteenth Amendment stopped short of granting Indians the right to vote by limiting its application to "citizens of the United States," a status which at that time had not

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[23] *See, e.g.*, Cong. Globe, 39th Cong., 1st Sess. 2894 (1866) (statement of Senator Trumbull); *id.* at 2895 (statement of Senator Howard); *id.* at 2897 (statement of Senator Williams).

been conferred on any of the aboriginal peoples of the United States. *See* U.S. Const. amend. XV, § 1. Significantly, the applicability of these Amendments did not turn on whether a particular Indian was a member of a tribe. In *Elk v. Wilkins*, 112 U.S. 94 (1884), this Court rejected the argument that an Indian who had severed his tribal relations thereby became a citizen of the United States under the Fourteenth Amendment or was entitled to vote in state elections under the Fifteenth Amendment.

Congress ultimately conferred citizenship upon Indians by statute.[24] But this Court has held repeatedly that citizenship does not extinguish the authority of Congress to enact legislation solely affecting Indians.[25] The special benefits or restrictions, if imposed by federal law, must be "tied rationally to the fulfillment of Congress' unique obligation toward the Indians." *Mancari*, 417 U.S. at 555. But as the Court observed, "[o]n numerous occasions this Court specifically has upheld legislation that singles out Indians for particular and special treatment." *Id.* at 554-55. In short, differential treatment for Indians is permitted under the Constitution even after adoption of the Fourteenth and Fifteenth Amendments.

In *Mancari*, this Court upheld a preference for Indians in the Bureau of Indian Affairs on both statutory and constitutional grounds. As to the Constitution, this Court held:

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[24] Act of June 2, 1924, ch. 233, 43 Stat. 253. Prior to 1924, Congress naturalized specific tribes or classes of Indians, particularly Indians receiving allotments under section 6 of the General Allotment Act of 1887, § 6, 24 Stat. 390, 25 U.S.C. § 349. *See generally Cohen Handbook*, *supra* note 18, at 642-45.

[25] *See, e.g., Bryan v. Itasca County, Minn.*, 426 U.S. 373 (1976) (immunity from state personal property tax); *Morton v. Mancari*, 417 U.S. 535 (1974) (preference in employment); *Morton v. Ruiz*, 415 U.S. 199 (1974) (federal welfare benefits); *Board of County Comm'rs of Creek County v. Seber*, 318 U.S. 705 (1943) (exemption of Indian allotment from state taxation); *Brader v. James*, 246 U.S. 88 (1918) (restriction on conveyance of land); *Hallowell v. United States*, 221 U.S. 317 (1911) (Indian liquor laws).

> Contrary to the characterization made by appellees, this preference does not constitute "racial discrimination." Indeed, it is not even a "racial preference." Rather, it is an employment criterion reasonably designed to further the cause of Indian self-government and to make the BIA more responsive to the needs of its constituent groups. It is directed to participation by the governed in the governing agency. The preference is similar in kind to the constitutional requirement that a United States Senator, when elected, be "an Inhabitant of that State for which he shall be chosen," Art I ,§ 3, cl. 3, or that a member of a city council reside within the city governed by the council.

Id. at 553-54. Based on its conclusion that the preference was political rather than racial, this Court applied the rational-basis level of judicial review to the statute and found that it was rationally related to the goal of allowing the people governed to have a role in the governing body – the very goal at issue here.

B. The Applicability of *Mancari* Does Not Turn On Whether Native Hawaiians Are Organized Into Tribes.

Petitioner argues (Pet. Br. 39-45) that the principle of *Mancari* is limited to Indians who are members of federally recognized tribes. This confuses context with principle. *Morton* was decided in the context of a statutory preference for members of federally recognized tribes in the BIA, which provides benefits only to federally recognized tribes. The preference at issue in *Mancari* thus was directed at the people affected by the agency in question. The Court's reference to federally recognized Indian tribes occurs in a footnote as *an additional* reason why the preference is not racial. *See id.* at 553 n.24. The Court's reasoning in *Mancari* applies equally to Hawai`i's program. Just as all "Indians" do not receive a preference in the BIA, all Polynesians do not receive benefits from OHA. *See supra*, p. 3. *Mancari* is not based on a particular form of tribal government but on the broader premise that the Constitution itself "singles Indians out as a proper subject for separate legislation." *Mancari*, 417 U.S. at 551.

This Court has made clear that the principles of *Mancari* are not limited to Indians who are members of a federally recognized

tribe. In *Delaware Tribal Business Committee v. Weeks*, 430 U.S. 73 (1977), the Court upheld a statute that provided for assets to be distributed to the heirs of two recognized tribes without regard to whether the heirs were members of the tribes. The Court held that such action by Congress is constitutional if it "can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians...." 430 U.S. at 85 (*quoting Mancari*, 417 U.S. at 555). The Court's unanimous opinion in *United States v. John*, 437 U.S. 634 (1978), likewise rejects a constitutional distinction between tribal and non-tribal Indians. In *John*, the Court deferred to Congress's power to create a reservation (and thus a separate regime of federal criminal laws) for Indians remaining in Mississippi, even though they were a "remnant of a larger group of Indians" that had long ago moved to Oklahoma, *id.* at 653, and even though the Solicitor of the Department of the Interior had expressly concluded that these Indians "cannot now be regarded as a tribe." *Id.* at 650 n.20 (*quoting Cohen Handbook*).

Native Hawaiians are in the same position. They once were self-governing and the owners of all the land in Hawai`i. After a period of great loss, they have received federal recognition, assistance, and increasing degrees of self-determination. In light of *Delaware Tribal* and *John* and the history of congressional action in Hawai`i and Alaska, *Mancari* cannot be read to support the proposition that laws benefiting Native Hawaiians are racial legislation because Native Hawaiians are not organized into tribes.

Nor is there is any reason to classify the Native Hawaiian people as non-tribal or non-recognized. Beginning in the period of territorial government and throughout Statehood, the United States has recognized Native Hawaiians as one of its indigenous peoples. Native Hawaiians had their own Native governments and defined territory long before Europeans arrived. Because of this history, Congress has not tried to divide Hawaiians into separate tribes but, as in Alaska, has treated the aboriginal peoples as one political group.

C. The Constitution Allows Native Americans To Exercise Control Over Assets Set Aside For Their Benefit.

Allowing Native Americans to determine how their funds are spent is the rule, not the exception. Almost every Indian tribe in the United States receives funds from Congress. All of the people of the United States, through their representatives, participate in the decision whether to provide such funds. But once provided, the funds are expended essentially as the tribal council determines. The right to vote for members of the tribal council is limited to members of the tribe even if (as is usually the case) non-tribal members live on the tribe's reservation. The same is true in corporations established under ANCSA. Only Native Alaskans vote on the use of lands and moneys initially provided by Congress.

Similarly, in Sections 16 and 17 of the Indian Reorganization Act of 1934 (IRA), Congress authorized Indian tribes in the United States to adopt constitutions establishing tribal councils and to form tribal business corporations. *See* IRA §§ 16, 17, 48 Stat. 984, 987 (codified at 25 U.S.C. §§ 476, 477). Elections to decide whether to re-organize under the IRA – "authorized and called by the Secretary of the Interior" and thus federal elections – were limited to "the adult members of the tribe, or the adult Indians residing on such reservation," 25 U.S.C. § 476, even though many non-Indians reside on reservations and the tribes' revitalization had enormous consequences for neighboring communities and States.

In short, the Hawai`i statutes limiting to Native Hawaiians the right to vote in elections for OHA Trustees who will administer lands and funds devoted exclusively to their benefit are wholly consistent with the Constitution and federal law.[26]

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[26] Because the OHA Trustees administer the trust solely for the benefit of Native Hawaiians, the State's decision to allow Native Hawaiians to elect the trustees draws additional support from a line of this Court's decisions holding, in the context of the one-person, one-vote requirement of the Fourteenth Amendment, that voting for members of governmental bodies that primarily affect a particular group of citizens may be limited to those (...continued)

III. THE STATE OF HAWAI`I ACTED WITHIN ITS AUTHORITY IN CREATING THE OFFICE OF HAWAIIAN AFFAIRS.

The State of Hawai`i's power to create OHA rests on three distinct but related grounds: Congress's delegation of authority to the State, subsequent Congressional action ratifying the establishment of OHA, and the State's own sovereign powers.

A. Congress Delegated Authority To The State of Hawai`i And Ratified The State's Actions.

Congress has delegated to the State of Hawai`i substantial authority over Native Hawaiians. Rather than requiring Hawai`i to disclaim responsibility for Native Hawaiians, Congress required Hawai`i, as a condition of Statehood, to maintain the HHCA program, and authorized it to use public trust lands to support the program. *See supra*, pp. 8-9. In federal laws enacted both before and after the creation of OHA. Congress expanded the definition of Native Hawaiians to include all descendants of the aboriginal people of Hawai`i.

Hawai`i's decision to provide additional benefits to Native Hawaiians is consistent with the intent of Congress and therefore within the scope of the State's delegated authority to assume responsibility for its aboriginal people. In *Washington v. Confederated Bands & Tribes of the Yakima Indian Nation*, 439 U.S. 463 (1979), the Court interpreted a federal statute authorizing certain States to assume jurisdiction within Indian reservations but requiring them to amend their constitutions to do so. The State of Washington did not amend its constitution, and chose to assume jurisdiction only as to certain topics and certain lands. The Yakima Tribe argued that the State had not adhered to the congressional delegation of authority. The Court held, however, that the State, though not complying with the terms of the Statute, had acted consistently with the intent of Congress and upheld the

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who are particularly affected. *See Salyer Land Co. v. Tulare Lake Basin Water Storage Dist.*, 410 U.S. 719 (1973); *Ball v. James*, 451 U.S. 355 (1981).

State's assumption of partial jurisdiction. The Court's decision in *Yakima* provides support for the conclusion that Hawai`i has also acted in a way that is consistent with the intent of Congress.

This case, however, is easier than *Yakima*. The Court here need not engage in analysis to discern the intent of Congress. Congress has made its intent clear by enacting numerous statutes that recognize all Native Hawaiians as Native Americans and by enacting multiple statutes that delegate authority or provide funds to OHA. Taken together, these congressional actions amount to a ratification of Hawai`i's creation of OHA. *Cf. Seymour v. Superintendent of Washington State Penitentiary*, 368 U.S. 351, 356-57 (1962) (subsequent legislation explicitly recognizing the existence of a reservation is persuasive evidence that it was not abolished by earlier legislation); *Dames & Moore v. Regan*, 453 U.S. 654, 686 (1981) (relying on "the character of the legislation Congress has enacted in the area" and "the history of [congressional] acquiescence").

Hawai`i's programs for Native Hawaiians are well known to Congress. The only actions taken by Congress have been in support of those programs. This Court should not upset that legislative determination.

B. The State Of Hawai`i Has Independent Authority To Assist Its Aboriginal People.

Acts of Congress and treaties of the United States concerning aboriginal peoples are the supreme law of the land. Thus where Congress has established Indian reservations, state law is necessarily limited. But Congress's power in this field, as in many others, is not exclusive. Many states have enacted laws concerning aboriginal peoples, often providing benefits or protections for them not supplied by Congress.[27]

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[27] States have enacted laws that (1) recognize tribes that are not federally recognized, *see* Conn. Gen. Stat. § 47-59a; Del. Code Ann. Tit. 29 § 105; Ga. Code Ann. § 44-12-300 ; N.C. Gen. Stat. §§ 71-A-1 *et seq.*; Virginia, House Joint Resolution Nos. 5 (1983), 205 (1985) and 390 (1989); (2) establish independent agencies or corporations to manage tribal funds, *see* Fla. Stat. Ann. § 285.19; R.I. Gen. Laws § 37-18-11; (3) establish (...continued)

In *New York ex rel. Cutler v. Dibble*, 62 U.S. (21 How.) 366 (1858), the Court upheld the right of a State to enact laws concerning Indian tribes if not contrary to a federal treaty with the tribe or federal law. The State of New York had enacted a law making it a criminal offense to intrude upon Indian land. Cutler was arrested for doing so and challenged the constitutionality of the law. This Court upheld the law, stating, "[t]he only question which this court can be called on to decide is, whether this law is in conflict with the Constitution of the United States, or any treaty or act of Congress." *Id.* at 370. The Court held that the State had the power to "preserve the peace of the commonwealth" and protection of the Indians fell within that power. The Court concluded that "[t]he act is, therefore, not contrary to the Constitution of the United States," nor to "any act of Congress, as no law of Congress can be found which authorizes white men to intrude on the possessions of Indians." *Id.*; *accord Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148 (1973) (noting "the repeated statements of this Court to the effect that, even on reservations, state laws may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law").[28]

Thus Hawai`i need not depend wholly on authority delegated by Congress or on congressional ratification to support the provisions of Hawai`i's Constitution that address the welfare of its aboriginal peoples. Hawai`i has power to enact such legislation so long as it does not contravene a treaty or Act of Congress. It has acted well within its power here. Hawai`i has preserved the

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councils or commissions to assist tribes; *see* S.D. Codified Laws § 1-4-1; N.J. Stat. Ann. § 52:16A-53; Wyo. Stat. Ann. § 9-2-1904; Rev. Stat. Neb. Ann. § 81-2501; 30 M.R.S. § 6212; Conn. Gen. Stat. § 47-59b; N.C. Gen. Stat. § 143B; and (4) provide scholarships, tax exemptions, and certain protections for the children of tribal members, *see* 8 NYCRR Ch. II, Subpart 1 § 145, 145-4; 18 NYCRR § 431; 20 NYCRR § 529.9.

[28] In *Oneida Nation of New York v. County of Oneida, N.Y.*, 414 U.S. 673, 661 (1974), the Court noted that *Dibble* recognized a state power "to protect Indian possession." *See Cohen Handbook*, *supra* note 18, at 278-79.

HHCA, as required in the Admission Act, and has implemented the Admission Act through the establishment of OHA to ensure that a portion of the proceeds of the public lands are used for the betterment of the conditions of native Hawaiians. Both before and after the creation of OHA, Congress recognized a broader category of Native Hawaiians in legislation conferring federal benefits. In accordance with that legislation, and in furtherance of Congress's promotion of native self-government, the people of the State of Hawai`i have provided funds for the benefit of all Native Hawaiians and have decided that the OHA Trustees should be elected by the beneficiaries of the trust. The Constitution does not require this Court to reject that determination by all the people of Hawai`i.

CONCLUSION

The judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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July 1999

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APPENDIX

1. The following are some of the Acts of Congress defining Native Hawaiians, without blood quantification, as Native Americans and including them in benefit programs:

The American Indian Religious Freedom Act, Pub. L. No. 95-341, 92 Stat. 469 (1978), 42 U.S.C. § 1996.

The Native American Programs Act of 1974, Pub. L. No. 93-644, § 11, 88 Stat. 2323-26 (1975), 42 U.S.C. § 2991-92.

The Native American Employment and Training Programs in the Comprehensive Employment and Training Act Amendments of 1978, Pub. L. No. 102-367, § 201, 106 Stat. 1052 (1992), Repealed Pub. L. No. 95-524, § 2, 92 Stat. 1962 (1978), 29 U.S.C. § 1601 *et. seq.*

The Drug Abuse Prevention, Treatment and Rehabilitation Act, § 410(d), Pub. L. No. 98-24 § 5(a)(3), 97 Stat. 183 (1983), 21 U.S.C. § 1177(d).

The Comprehensive Alcohol Abuse and Alcoholism Prevention, Treatment, and Rehabilitation Act, § 311(c)(4), Pub. L. No. 98-24, § 5(a)(1), 97 Stat. 175, 183 (1983), 42 U.S.C. § 4577(c)(4).

The Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, 104 Stat. 3048 (1990), 25 U.S.C. secs. 3001-13.

The Cranston Gonzalez National Affordable Housing Act, Pub. L. No. 101-625, § 958, 104 Stat. 4079, 4422 (1990), 42 U.S.C. § 1437f.

The National Historic Preservation Act of 1966, Pub. L. No. 89-665, § 101, 80 Stat. 915 (1966), 16 U.S.C. § 470a(d)(6).

The National Museum of the American Indian Act, §§ 1-10, 13, 16, Pub. L. No. 101-185, 103 Stat. 1336 (1989), 20 U.S.C. §§ 80q-80q-8, 80q-11, 80q-14.

The Native American Languages Act, Pub. L. 101-477, § 101, 104 Stat. 1153 (1990), 25 U.S.C. § 2901-12.

The Workforce Investment Act of 1998, Pub. L. No. 105-220, § 166, 29 U.S.C. § 2911 (supporting employment and training programs for Native Hawaiians and other Native Americans).

The Native Hawaiian Health Care Improvement Act of 1992, Pub. L. No. 102-396, § 9168, 106 Stat. 1948 (1992), 42 U.S.C. § 11701-14.

The Older Americans Act of 1965, 89-73, § 101, 79 Stat. 219 (1965),42 U.S.C. § 3001 *et seq*.

The Rehabilitation Act of 1973, Pub. L. No. 93-112, § 2, 87 Stat. 357 (1973), 29 U.S.C. § 701 *et seq*.

The Developmental Disabilities Assistance Bill of Rights Act Amendments of 1987, Pub. L. 100-146, 101 Stat. 840 (1987), codified in scattered sections of 42 U.S.C.

The Disadvantaged Minority Health Improvement Act of 1990, Pub. L. No. 101-527, 104 Stat. 2311 (1990), 42 U.S.C. § 201 *et seq*.

Title IV of the Hawkins-Stafford Elementary and Secondary School Improvement Amendments of 1988, Pub. L. 100-297, 102 Stat. 358 (1988), Repealed Pub. L. No. 103-382, § 363, 108 Stat. 3975 (1994), 20 U.S.C. § 4901 *et seq*.

The Indian Health Care Amendments of 1988, Pub. L. No. 94-437, § 2, 90 Stat. 1400 (1976), 25 U.S.C. § 1601 *et seq*.

Pub. L. No. 99-498, § 1521, 100 Stat. 1610 (1986), 20 U.S.C. § 4441 (providing funding for Native Hawaiian arts and cultural development).

Pub. L. No. 103-382, § 101, 108 Stat. 3685 (1994), 20 U.S.C. § 7118 (providing funding for Native Hawaiian drug prevention programs).

2. The following are Acts of Congress with specific references to the Office of Hawaiian Affairs.

Pub. L. No. 100-713, § 106, 102 Stat. 4787 (1990), 42 U.S.C. § 254s) (providing for health care scholarships for Native Hawaiian students).

Native American Programs Amendment Act of 1987 (Native Hawaiian Revolving Loan Fund), Pub. L. No. 100-175, § 506(a), 101 Stat. 976 (1987), 42 U.S.C. § 2991b-1.

Native American Graves Protection and Repatriation Act, Pub. L. No. 101-601, § 2, 104 Stat. 3048 (1990), 25 U.S.C. § 3001.

National Museum for the American Indian Act, Pub. L. No. 101-185, § 13, 103 Stat. 1345 (1989), 20 U.S.C. § 80q-11.

National Historic Preservation Act Amendments of 1992, Pub. L. No. 102-575, § 4019(a), 106 Stat. 4763 (1992), 16 U.S.C. § 470w.

Native Hawaiian and Alaska Native Culture and Arts Development Act, Pub. L. No. 99-498, § 1521, 100 Stat. 1610 (1986), 20 U.S.C. § 4441.

Improving America's Schools Act (Native Hawaiian Education Act), Pub. L. No. 103-382, § 101, 108 Stat. 3798, 3805 (1994), 20 U.S.C. §§ 7904 and 7912.

Native Hawaiian Health Care Act of 1988, Pub. L. No. 100-579, § 12, 102 Stat. 2923 (1988), 42 U.S.C. § 11711.

(14)

Supreme Court, U.S.
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No. 98-818

IN THE
Supreme Court of the United States

HAROLD F. RICE,
Petitioner,

v.

BENJAMIN J. CAYETANO, Governor of Hawai'i,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF THE KAMEHAMEHA SCHOOLS BISHOP ESTATE TRUST AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Amicus will address only the following question:

Whether the State of Hawai'i may implement Congress' delegation of its special or trust obligation to the Hawaiian people by establishing an Office of Hawaiian Affairs ("OHA") to administer trust funds dedicated to the betterment of the Hawaiian people and providing that OHA shall be governed by a Board of Trustees elected by the Hawaiian people without running afoul of the Equal Protection Clause of the Fourteenth Amendment.

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INTEREST OF *AMICUS CURIAE* [1]

At issue in this case is the constitutionality of a Hawai'i statute which provides that only "Hawaiians" may vote in elections for trustees of the Office of Hawaiian Affairs, whose primary responsibility is the administration of trust funds for the benefit of Hawaiians and "native Hawaiians." [2]

At the end of the 19th century, *amicus*, the Kamehameha Schools Bishop Estate Trust ("KSBE"), established the Kamehameha Schools on the island of O'ahu in Hawai'i. The Schools give preference in admission to children with at least one Hawaiian ancestor. KSBE is exempt from federal income taxation under the Internal Revenue Code, because it is an organization operated exclusively for educational purposes. See 26 U.S.C. § 501(c)(3). The Internal Revenue Service ("IRS") has determined that the Schools' preference for applicants with a Hawaiian ancestor does not constitute discrimination on the basis of race. See IRS, National Office Technical Advice Memorandum, *Kamehameha Schools/Bernice Pauahi Bishop Estate* (Apr. 19, 1999) ("IRS Memo."). The legal test for determining whether KSBE is entitled to section 501(c)(3) status

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[1] Pursuant to this Court's Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person or entity other than *amicus* and its counsel made any monetary contribution to the preparation or submission of this brief. Pursuant to Rule 37.3, *amicus* states that the parties consented to the filing of this brief in letters filed with this Court.

[2] "Hawaiian" means "any descendant of the aboriginal peoples inhabiting the Hawaiian Islands which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." Haw. Rev. Stat. § 10-2. "Native Hawaiian" means "any descendant of not less than one-half part of the . . . aboriginal peoples which exercised sovereignty and subsisted in the Hawaiian Islands in 1778, and which peoples thereafter have continued to reside in Hawaii." *Id.* In this brief, we refer to Hawaiians and Native Hawaiians collectively as "the Hawaiian people."

differs from the legal test for determining whether a law that makes distinctions based on ancestry is constitutional. See, *e.g.*, *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 592-96 (1983). Nonetheless, KSBE has a strong interest in demonstrating that the statute at issue does not unconstitutionally discriminate on the basis of race.

Amicus is uniquely qualified to address the history and legality of legislative preferences for the Hawaiian people. Born in 1831, Ke Ali'i Bernice Pauahi Bishop was the great-granddaughter of King Kamehameha I, and she inherited the private lands of the Kamehameha family. As an ali'i or chief, she was also a member of the traditional ruling class of the Hawaiian people. In the late 19th century, she, like other ali'i, saw that as a result of western discovery, her people "were in a terrible condition":

> In the year Pauahi was born there were 124,500 Hawaiians, and [in 1883], . . . there were approximately only 40,014 left. . . . Many of the remaining Hawaiians suffered from diseases such as leprosy, tuberculosis, diabetes, gonorrhea, syphilis, and cancer. Following the earlier epidemics, still more would fall to new sicknesses such as the mumps, beriberi, and diphtheria. [George H.S. Kanahele, *Pauahi: The Kamehameha Legacy* 170 (1986.)]

Hawaiian culture was suffering with its people, as the Hawaiian language gave way to English and as Hawaiian traditions were disparaged and neglected. *Id.* at 171. The Hawaiian people developed a crippling sense of defeat and of inferiority to western peoples. "There was an economic antecedent to most if not all of these problems. Hawaiians had long lost control of their economy, partly through the loss or sale of their lands and through being driven out of certain traditional occupational fields like farming[,] . . . small scale shipbuilding and retailing." *Id.* at 172.

Bernice Pauahi Bishop, again like other ali'i of her day, dedicated her family's resources to her people.[3] She concluded that education was essential to their survival and prosperity in the future. Accordingly, her Will, signed in 1883, bequeathed the majority of her estate:

> [T]o erect and maintain in the Hawaiian islands two schools, each for boarding and day scholars, one for boys and one for girls, to be known as, and called the Kamehameha Schools. . . . I desire my trustees to provide first and chiefly a good education in the common English branches, and also instruction in morals and in such useful knowledge as may tend to make good and industrious men and women. [Will of Bernice Pauahi Bishop, *reprinted in Wills and Deeds of Trust* 17-19.]

She further directed her trustees to "devote a portion of each year's income to the support and education of orphans, and others of indigent circumstances, giving the preference to Hawaiians of pure or part aboriginal blood." *Id.* at 18.

The Kamehameha Schools for boys and girls were accordingly established in 1887 and 1894, respectively, and later consolidated as co-educational institutions. Their mission is to "Promote the educational development of

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[3] KSBE is only one of the Ali'i Trusts. In his 1874 Will, King William Lunalilo created a trust "for the use and accommodation of the poor, destitute and infirm people of Hawaiian blood and extraction, giving preference to old people." *See In re Will of William Charles Lunalilo*, Equity No. 2414-A (Haw. 1942). The Lunalilo Home cares for elderly Hawaiians today. The Queen Lili'uokalani Trust was established in 1909 "for the benefit of orphan and other destitute children in the Hawaiian islands, the preference to be given to Hawaiian children of pure or part aboriginal blood." Deed of Trust of Queen Lili'uokalani, dated Dec. 2, 1909, *recorded in the* Registry Office in Honolulu, Hawai'i, Liber 319, at 447-59. Today that trust funds the Queen Lili'uokalani Children's Center.

all people at KSBE; Encourage, cultivate and inspire students, graduates, and staff to serve the Hawaiian community and community at large; Preserve and perpetuate Hawaiian culture, traditions, and values; [and] Instill throughout the organization Hawaiian ancestral values."

As stated above, the Schools give preference in admission to applicants who have at least one Hawaiian ancestor. They are, however, exemplars of racial and cultural diversity. "*Applicants of any racial or ethnic background are admitted, as long as they have at least one Hawaiian ancestor.*" IRS Memo. at 2 (emphasis supplied). As the appendix to this brief vividly illustrates, the student population is remarkably diverse.

Amicus files this brief in support of the State to show that the statute at issue does not discriminate on the basis of race. It is instead a political preference for the aboriginal, formerly sovereign people of Hawai'i whose sovereignty was "illegally" overthrown and whose public lands were taken without "consent . . . or compensation." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993) ("Apology Resolution").

HISTORICAL BACKGROUND

1. Hawaiians are the indigenous or aboriginal people of the island group that is today the State of Hawai'i. Hawai'i was originally settled by voyagers from central and eastern Polynesia, traveling immense distances in double-hulled voyaging canoes and arriving in Hawai'i perhaps as early as 300 A.D. The original Hawaiians were thus part of the Polynesian family of peoples, which includes the Maori, Samoans, Tongans, Tahitians, Cook Islanders, Marquesans, and Easter Islanders. 1 Ralph S. Kuykendall, *The Hawaiian Kingdom* 3 (1938). Hundreds

of years of Hawaiian isolation followed the end of the era of "long voyages." *Id.* During these centuries, the Polynesians living in Hawai'i evolved a unique system of self-governance and a "highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Apology Resolution at 1510.

At the pinnacle of the political, economic and social structure of each of the major Hawaiian islands was a mo'i, a king. Below the king, individuals occupied three major classes. The highest class, the ali'i, were important chiefs. Next in rank were members of the kahuna class, who advised the ali'i as seers, historians, teachers, priests, astronomers, medical practitioners, and skilled workers. Third, the maka'ainana were the "people of the land," who fished and farmed and made up the bulk of the population. Lawrence H. Fuchs, *Hawaii Pono: An Ethnic and Political History* 5 (1961); *Native Hawaiian Rights Handbook* 5 (Melody K. MacKenzie ed., 1991).

The political, economic and social structures were mutually supportive. The kings held all land and property which they subdivided among the chiefs. Substantial chiefs supervised large estates (ahupua'as), which usually extended from the sea to the mountains so that they could fish, farm, and have access to the products of the mountain forest. They, in turn, divided the ahupua'as into 'ilis, run by lesser chiefs whose retainers cultivated the land. The commoners worked the land and fished, exchanging labor for protection and some produce from their own small plots. Agriculture was highly diverse, including taro, bananas, yams, sugar cane, and broadfruit. The taro plant, whose starchy root is pounded into poi, requires substantial moisture so Hawaiians developed a superior system of irrigation. See Jon J. Chinen, *The Great Mahele* 3-4 (1958); Fuchs, *supra* at 5-7; MacKenzie, *supra* at 3-5.

The Hawaiian economy was also dependent upon many skilled artisans. For example, special skills were necessary for the building of outrigger canoes, the making of tapa (a paper-like material used for clothing and bedding), the drying of fish, the construction of irrigation systems and fishponds, the catching of birds (whose feathers were worn in chiefs' cloaks and helmets), and the sharpening of stones for building and fighting. MacKenzie, *supra* at 4.

"The concept of private ownership of land had no place in early Hawaiian thought." *Id.* at 4. The moi's or king's authority was derived from the gods, and he was a trustee of the land and other natural resources of the island. *Id.* Chiefs owed military service, taxes, and obedience to the king, but neither chiefs, nor skilled laborers, nor commoners were tied to a particular piece of land or master. All lands conferred by the king or chief were given subject to revocation. In turn, neither commoners nor skilled laborers were required to stay with the land; if maltreated or dissatisfied, an individual could move to another ahupua'a or 'ili. *Id.*; see also Fuchs, *supra* at 5.

Hawaiians also had a complex religion, focused on several major gods—most notably Kane, god of life and light, Lono, god of the harvest and peace, Ku, god of war and government, and Pele, goddess of fire. The religion generated a detailed system of taboos (kapus), enforced by priests, which supported the political, economic and social systems of the islands. See Ralph S. Kuykendall & A. Grove Day, *Hawaii: A History* 11 (1964).

The language and culture of the Hawaiian people were rich and complex. Hawaiians possessed an "extensive literature accumulated in memory, added to from generation to generation, and handed down by word of mouth. It consisted of meles (songs) of various kinds, genealogies and honorific stories . . . [much of which] was used as an accompaniment to the hula." 1 Kuykendall, *supra* at

10-11. Hawaiians also had "a rich artistic life in which they created colorful feathered capes, substantial temples, carved images, formidable voyaging canoes, tools for fishing and hunting, surfboards, weapons of war, and dramatic and whimsical dances." Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 95 (1998) (citing, *e.g.*, Joseph Fehrer, *Hawai'i: A Pictorial History* 36-132 (1969)).

The communal nature of the economy and the caste structure of the society resulted in values strikingly different from those prevalent in more competitive western economies and societies. For example, Hawaiian culture stressed cooperation, acceptance, and generosity, and focused primarily on day-to-day living. See, *e.g.*, Fuchs, *supra* at 74-75.

Hawai'i was not Utopia. There were wars between the island chiefs and among other ali'i. Natural disasters, such as tidal waves and volcanic eruptions, often killed or displaced whole villages. But Hawai'i's social, economic, and political system was highly developed and evolving, and its population, conservatively estimated to be at least 300,000,[4] was relatively stable before the arrival of the first westerners.

2. Hawai'i was "discovered" by the west in 1778, when the first haole or white foreigner, English sea captain James Cook, landed. Because he arrived during a festival associated with Lono in a ship whose profile resembled Lono's symbol, he was greeted as that long-departed god. Other western ships soon followed on journeys of exploration or trade. E.S. & Elizabeth G. Handy, *Native Painters in Old Hawaii* 331 (1972).

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[4] This estimate is conservative; other sources place the number at one million. David E. Stannard, *Before the Horror: the Population of Hawai'i on the Eve of Western Contact* 59 (1989).

In the years that followed the arrival of Cook and other westerners, warring Hawaiian kings, now aided by haole weapons and advisers, fought for control of Hawai'i. King Kamehameha I won control of the Big Island, Hawai'i, and then successfully invaded Mau'i, Lana'i, Moloka'i, and O'ahu. By 1810, he also gained the allegiance of the King of Kaua'i. Despite the political unification of the islands, Kamehameha I's era saw the first steps toward the devastation of the Hawaiian people.

The immediate, brutal decimation of the population was the most obvious result of contact with the west. Between Cook's arrival and 1820, disease, famine, and war killed more than half of the Hawaiian population. By 1866, only 57,000 Hawaiians remained from the basically stable pre-1778 population of at least 300,000. See note 4, *supra*; see also *supra* at 2. The impact was greater than the numbers can convey: Old people were left without the young adults who supported them; children were left without parents or grandparents. The result was a rending of the social fabric.

This devastating population loss was accompanied by cultural, economic, and psychological destruction. Western sailors, merchants, and traders did not respect Hawaiian kapus or religion and were beyond the reach of the priests. The chiefs began to imitate the foreigners, whose ships and arms were so superior to their own. The kapus were abolished soon after Kamehameha I died. See Fuchs, *supra* at 8-9. Christianity, principally in the person of American missionaries, quickly flowed into the breach. Christianity condemned not only the native religion, but the worldview, language, and culture that were intertwined with it. The loss of the old gods, along with the law and culture predicated on their existence, resulted in

substantial social conflict and imbalance. *Id.* at 9; Kuykendall & Day, *supra* at 40-41.

Western merchants also forced rapid change in the islands' economy. Initially, Hawaiian chiefs sought to trade for western goods and weapons, taxing and working commoners nearly to death to obtain the supplies and valuable sandalwood needed for such trades and nonetheless becoming seriously indebted. As Hawai'i's stock of sandalwood declined, so, too, did that trade, but it was replaced by whaling and other mercantile activities. See Fuchs, *supra* at 10-11; Kuykendall & Day, *supra* at 41-43; MacKenzie, *supra* at 5. More than four-fifths of Hawai'i's foreign commerce was American; the whaling services industry and mercantile business in Honolulu were almost entirely in American hands. See Fuchs, *supra* at 18-19; MacKenzie, *supra* at 6, 9-10. What remained to the Hawaiian people was their communal ownership and cultivation of the land; but, as described *infra*, that, too, was soon replaced by a western system of individual property ownership.

3. As the middle of the 19th century approached, the islands' small haole population wielded an influence far in excess of its size. See Felix S. Cohen, *Handbook of Federal Indian Law* 799 (2d ed. 1982) ("[a] small number of Westerners residing in Hawaii, bolstered by Western warships which intervened at critical times, exerted enormous political influence"). These influential haoles sought to limit the absolute power of the Hawaiian king over their legal rights and to implement western property law so that they could accumulate and control land.

By dint of foreign pressure, these goals were achieved. See, *e.g.*, MacKenzie, *supra* at 6; 1 Kuykendall, *supra* at 206-26. In 1840, Kamehameha III promulgated a new constitution, establishing an hereditary House of Nobles and an elected House of Commons. And, in 1842, the

King authorized the Mahele of 1848; the beginning of the division of Hawai'i's communal land which led to the transfer of substantial amounts of land to western hands.

In the Mahele, the King conveyed about 1.5 million of the approximately 4 million acres in the islands to the main chiefs; he reserved about 1 million acres for himself and his successors ("Crown Lands"), and allocated about 1.5 million acres to the government of Hawai'i ("Government Lands"). All land remained subject to the rights of native tenants. MacKenzie, *supra* at 7-9; Chinen, *supra* at 15-24. In 1850, after the division was accomplished, an act was passed permitting aliens to purchase land in fee simple. The expectation was that commoners would receive a substantial portion of the distribution to the chiefs because they were entitled to file claims to the lands that their ancestors had cultivated. In the end, however, only 28,600 acres (less than 1% of the land) were awarded to about 8,000 individual farmers.[5]

Soon after the Mahele, a dramatic concentration of land ownership in haole plantations, estates, and ranches occurred. Ultimately, the 2,000 westerners who lived on the islands obtained much of the profitable acreage from the commoners and chiefs. MacKenzie, *supra* at 9-10.

These economic changes were devastating for the Hawaiian people. The communal land system of subsistence farming and fishing was at an end. Large land estates owned by haoles controlled virtually all arable land. Hawaiians were not considered sufficiently cheap, servile labor for the backbreaking plantation work, and, indeed, did not seek it. Unable successfully to adjust either to the

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[5] *See* MacKenzie, *supra* at 7. Many maka'ainana did not secure their land because they did not know of or understand the law, could not afford the survey costs, feared that a claim would be perceived as a betrayal of the chief, were unable to farm without the traditional common cultivation and irrigation of large areas, were killed in epidemics, or migrated to cities. *Id.* at 8.

new economic life of the plantation or to the competitive economy of the city, many Hawaiians became part of " 'the floating population crowding into the congested tenement districts of the larger towns and cities of the Territory' under conditions which many believed would 'inevitably result in the extermination of the race.' " *Id.* at 44 (quoting S. Con. Res. 2, 10th Leg. of the Territory of Hawai'i, 1919 Senate Journal 25-26). Hawaiians developed a debilitating sense of inferiority, and descended to the bottom tier of the economy and the society of Hawai'i.

4. The mutual interests of Americans living in Hawai'i and the United States became increasingly clear as the 19th century progressed. American merchants and planters in Hawai'i wanted access to mainland markets and protection from European and Asian domination. The United States developed a military and economic interest in placing Hawai'i within its sphere of influence. In 1826, the United States and Hawai'i entered into the first of the four treaties the two nations signed during the 19th century. Americans remained concerned, however, about the growing influence of the English (who briefly purported to annex Hawai'i in 1842) and the French (who forced an unfavorable treaty on Hawai'i in 1839 and landed troops in 1849). American advisors urged the King to pursue international recognition of Hawaiian independence, backed up by an American guarantee.

In pronouncements made during the 1840s, the administration of President John Tyler announced the Tyler Doctrine, an extension of the Monroe Doctrine. It asserted that the United States had a paramount interest in Hawai'i and would not permit any other nation to have undue control or exclusive commercial rights there. Secretary of State Daniel Webster explained:

> The United States . . . are more interested in the fate of the islands, and of their government, than any

> other nation can be; and this consideration induces the President to be quite willing to declare, as the sense of the Government of the United States, that the Government of the . . . Islands ought to be respected; that no power ought either to take possession of the islands as conquest, or for the purpose of colonization, and that no power ought to seek for any undue control over the existing government, or any exclusive privileges or preferences in matters of commerce. [S. Exec. Doc. No. 52-77, 40-41 (1893) (describing 1842 statement).]

America's already ascendant political influence in Hawai'i was heightened by the prolonged sugar boom which followed the Mahele. Sugar planters were eager to eliminate the United States' tariff on their exports to California and Oregon. The mainland sugar growers strongly resisted the lifting of the tariff, but the United States' fear of "incipient foreign domination of the Islands" near its coast was stro than the mainland growers' lobby. Fuchs, *supra* at 2. The 1875 Convention on Commercial Reciprocity, Jan. 30, 1875, U.S.-Haw., 19 Stat. 625 (1875) ("Reciprocity Treaty"), eliminated the American tariff on sugar from Hawai'i and virtually all tariffs that Hawai'i had placed on American products. Critically, it also prohibited Hawai'i from giving political, economic, or territorial preferences to any other foreign power. Finally, when the Reciprocity Treaty was extended in 1887, the United States also obtained the right to establish a military base at Pearl Harbor.

5. Americans were determined to ensure that the Hawaiian government did nothing to damage Hawai'i's growing political and economic relationship with America. But the Hawaiian King and people were bitter about the loss of their lands to foreigners and were hostile both to the tightening bond with the United States and the increasing importation of Oriental labor by haole plantations.

Matters came to a head in 1887, when King Kalakaua appointed an anti-haole prime minister. The prime minister, with the strong support of the Hawaiian people, opposed granting a base at Pearl Harbor as a condition for extension of the Reciprocity Treaty, and took other measures that were considered anti-western. The business community, backed by the all-haole military group, the Honolulu Rifles, forced the prime minister's resignation and the enactment of a new constitution. The new constitution—often referred to as the Bayonet Constitution, Kuykendall & Day, *supra* at 171; MacKenzie, *supra* at 11—reduced the king to a figure of minor importance. It extended the right to vote to western males whether or not they were citizens of the Hawaiian Kingdom, and disenfranchised almost all native voters by giving only residents with a specified income level or amount of property the right to vote for members of the House of Nobles. The representatives of propertied haoles took control of the legislature. See MacKenzie, *supra* at 11 & n.71. A suspected native revolt in favor of the King's younger sister, Princess Lili'uokalani, and a new constitution were quelled when the American minister summoned Marines from an American warship at Honolulu. Haoles remained firmly in control of the government until the death of the King in 1891, when Queen Lili'uokalani came to power. See Fuchs, *supra* at 30.

On January 14, 1893, the Queen was prepared to promulgate a new constitution, restoring the sovereign's control over the House of Nobles and limiting the franchise to Hawaiian subjects. See MacKenzie, *supra* at 11; 3 Kuykendall, *supra* at 585-86. She was, however, forced to withdraw her proposed constitution. See Fuchs, *supra* at 30.

Despite the Queen's apparent acquiescence, the majority of haoles recognized that the Hawaiian monarchy posed

a continuing threat to the unimpeded pursuit of their interests. They formed a Committee of Public Safety to overthrow the Kingdom. Mercentile and sugar interests also favored annexation by the United States to ensure access on favorable terms to mainland markets and protection from Oriental conquest.

A Honolulu publisher and member of the Committee, Lorrin Thurston, informed the United States of a plan to dethrone the Queen. In response, the Secretary of the Navy informed Thurston that President Harrison had authorized him to say that " 'if conditions in Hawaii compel you to act as you have indicated, and you come to Washington with an annexation proposition, you will find an exceedingly sympathetic administration here.' " L.A. Thurston, *Memoirs of the Hawaiian Revolution* 230-32 (1936). The American annexation group closely collaborated with the American Minister in Hawai'i, John Stevens.

On January 16, 1893, at the order of Minister Stevens, American soldiers marched through Honolulu, to a building known as Arion Hall, located near both the government building and the palace. MacKenzie, *supra* at 3. The next day, local revolutionaries seized the government building and demanded that Queen Lili'uokalani abdicate. Stevens immediately recognized the rebels' provisional government and placed it under the United States' protection. *Id.*; see also Kuykendall & Day, *supra* at 178.

President Harrison promptly sent an annexation treaty to the Senate for ratification and denied any United States' involvement in the revolution. Before the Senate could act, however, President Cleveland, who had assumed office in March of 1893, withdrew the treaty. An investigator reported that the revolution had been accomplished by force with American assistance and against the wishes of Hawaiians. See Kuykendall & Day, *supra* at 179. To Congress, President Cleveland declared:

> [I]f a feeble but friendly state is in danger of being robbed of its independence and its sovereignty by a misuse of the name and power of the United States, the United States cannot fail to vindicate its honor and its sense of justice by an earnest effort to make all possible reparation. [3 Kuykendall, *supra* at 364.]

He demanded the restoration of the Queen. But the Senate Foreign Relations Committee issued a report ratifying Stevens' actions and recognizing the provisional government, explaining that relations between the United States and Hawai'i are unique because "*Hawaii has been all the time under a virtual suzerainty of the United States.*" S. Rep. No. 53-277, at 21 (1894) (emphasis supplied).

As a result of this impasse, the United States government neither restored the Queen nor annexed Hawai'i. The provisional government thus called a constitutional convention whose composition and members it controlled. See Kuykendall & Day, *supra* at 183. The convention promulgated a constitution that imposed property and income qualifications as prerequisites for the franchise and for the holding of elected office. *Id.* at 184; MacKenzie, *supra* at 13. " 'Native Hawaiians were, perhaps, not extremely sophisticated in governmental matters, but it took no great amount of political insight to perceive that this constitutional system was a beautifully devised oligarchy devoted to the purpose of keeping the American minority in control of the Republic.' " W. A. Russ, *The Hawaiian Republic (1894-1898)* 33-34 (1961). The Republic also claimed title to the Government Lands and Crown Lands, without paying compensation to the monarch. See MacKenzie, *supra* at 13. In 1894, Sanford Dole was elected President of the Republic of Hawai'i, and the United States gave his government prompt recognition.[6]

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[6] A short-lived counter-revolution commenced on January 7, 1895. Republic police discovered it, arrested many royalist leaders, and

The election of President McKinley in 1896 gave the annexation movement new vigor. Another annexation treaty was sent to the Senate. Simultaneously, the Hawaiian people adopted resolutions sent to Congress stating that they opposed annexation and wanted to be an independent kingdom. Russ, *supra* at 198, 209.[7] The annexation treaty failed in the Senate. But, to avoid the constitutional treaty procedure, pro-annexation forces in the House of Representatives introduced a Joint Resolution of Annexation which needed only a majority in each House of Congress. The balance was tipped at this moment by the United States' entry into the Spanish-American War. American troops were fighting in the Pacific, particularly in the Philippines, and the United States needed to be sure of a Pacific base. See Kuykendall & Day, *supra* at 188; MacKenzie, *supra* at 14. In July 1898, the Joint Resolution was enacted—"the fruit of approximately seventy-five years of expanding American influence in Hawaii." Fuchs, *supra* at 36.

On August 12, 1898, the Republic of Hawaii ceded sovereignty and conveyed title to its public lands, including the Government and Crown Lands, to the United States. Joint Resolution for Annexing the Hawaiian Islands to the United States, ch. 55, 30 Stat. 750, 751 (1898) ("Annexation Resolution"). In 1900, Congress passed the Organic Act, Act of April 30, 1900, ch. 339, 31 Stat. 141 (1900) ("Organic Act"), establishing Hawai'i's territorial government. And, in 1959, Congress admitted

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imprisoned the Queen. Eventually, she was forced to swear allegiance to the new Republic in exchange for clemency for the revolutionaries. MacKenzie, *supra* at 13; Fuchs, *supra* at 34-35.

[7] The resolutions were signed by 21,269 people, representing more than 50% of the Native Hawaiian population in Hawai'i at that time. *See* Van Dyke, *supra* at 103 & n.48 (citing Dan Nakaso, *Anti-Annexation Petition Rings Clear*, Honolulu Advertiser, Aug. 5, 1998, at 1).

Hawai'i to the Union as the 50th state. Admission Act of 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959) ("Admission Act").

6. Commencing with the Joint Resolution for Annexation, the United States has repeatedly recognized that, as a result of the above-recited history, it has a special relationship with the Hawaiian people and a trust obligation with respect to the public lands of Hawai'i.[8]

The special or trust relationship between the Hawaiian people and the United States was most explicitly affirmed in the Hawaiian Homes Commission Act of 1920 ("HHCA"), Pub. L. No. 76-34, 42 Stat. 108 (1921). Alarmed by the continuing impact of westernization and the loss of a communal land base, the Hawaiian people's leaders sought rehabilitation through a return to the land. See Fuchs, *supra* at 71; MacKenzie, *supra* at 17. Congress responded with HHCA, which set aside almost 200,000 acres of Hawai'i's public lands for long-term leases at nominal rent to native Hawaiians. For a variety of reasons, most notably the deliberate exclusion of the best agricultural land from homesteading, the Act did not succeed in its purpose. Its enactment has substantial importance, however, because it constitutes an express affirmation of the United States' trust responsibility to the Hawaiian people. See Van Dyke, *supra* at 104.

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[8] The Joint Resolution stated that "[t]he existing land laws of the United States relative to public lands shall not apply to such [public] land in the Hawaiian Islands; but the Congress of the United States shall enact special laws for their management and disposition" and that revenues from the lands were to be "used solely for the benefit of the inhabitants of the Hawaiian Islands for educational and other public purposes." Annexation Resolution at 750. Section 73 of the Organic Act of 1900 returned control of most of the lands to the territory, but it, too, required that revenues be devoted to "such uses and purposes for the benefit of the inhabitants of the Territory of Hawaii as are consistent with the joint resolution of annexation." Organic Act at 155 (§ 73).

In hearings preceding HHCA's enactment, Secretary of the Interior Franklin Lane explained the trust relationship on which the statute was premised:

> One thing that impressed me . . . was the fact that the natives of the islands who are our wards, I should say, and for whom in a sense we are trustees, are falling off rapidly in numbers and many of them are in poverty. [H.R. Rep. No. 66-839, at 4 (1920).]

He explicitly analogized the relationship between the United States and native Hawaiians to the trust relationship between the United States and other Native Americans, explaining that special programs for native Hawaiians are fully supported by history and "an extension of the same idea" that supports such programs for other Indians.[9]

In the Admission Act of 1959, Congress required Hawai'i's new state government to take responsibility for the Hawaiian Home Lands as a condition of statehood. In addition, Congress entrusted to the State 1,200,000 acres of Hawai'i's former public lands to be held for five listed purposes, including "the betterment of the conditions of the native Hawaiians." Admission Act at 6 (§ 5(f)). As Congress recently explained, the United States, in the Admission Act, "reaffirmed the trust relationship which existed between the United States and the Hawaiian people by retaining the legal responsibility of the State for the betterment of the conditions of Native Hawaiians under section 5(f)." Native Hawaiian Health Care Improvement Act Amendments of 1992, 42 U.S.C. § 11701(16).

Moreover, since the 1970s, Congress has passed myriad statutes providing special programs for the Hawaiian people or including the Hawaiian people in general programs

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9 *See* H.R. Rep. No. 66-839, at 129-30 (statement of Secretary Lane) ("[w]e have got the right to set aside these lands for this particular body of people, because I think the history of the islands will justify that before any tribunal in the world").

for native people. The full list of such federal laws is attached to the *amicus* brief of the Congressional Delegation of the State of Hawai'i. These laws recognize the United States' special relationship with the Hawaiian people.

Most pertinently, in the 1993 Apology Resolution, the United States recognized the historical record which is, in part, the source of its special or trust relationship with the Hawaiian people. 107 Stat. at 1510. The Apology Resolution finds that the Hawaiian people are "indigenous" to Hawai'i; that the Republic of Hawai'i "ceded 1,800,000 acres of crown, government and public lands of the Kingdom of Hawaii without the consent of or compensation to the native Hawaiian people of Hawaii or their sovereign government"; and that the "Hawaiian people never directly relinquished their claims to their inherent sovereignty as a people or over their national lands to the United States, either through their monarchy or through a plebiscite or referendum." *Id.* at 1512.[10]

The Hawaiian people received no independent benefits from the public lands trust until the state constitution was amended at a 1978 Constitutional Convention. The constitutional amendments affirmed that the State holds the ceded public lands as a trust, with Native Hawaiians as a distinct beneficiary. The amendments also created an Office of Hawaiian Affairs ("OHA") to administer a pro rata share (currently 20%) of the public land trust established under the Admission Act for the "betterment of the conditions of native Hawaiians." Haw. Rev. Stat. § 10-3(1). OHA is governed by a Board of Trustees whose

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10 *See also* 1994 Native Hawaiian Education Act, 20 U.S.C. § 7902(1), (5), (8) (finding that the Hawaiian people are "a distinct and unique indigenous people"; that the Kingdom of Hawaii was overthrown with United States' assistance, depriving Hawaiians of the right to self-determination; and affirming "the special relationship between the United States and the Native Hawaiians").

primary responsibility is to administer assets to benefit the Hawaiian people. *Id.* § 10-3(2). The OHA Trustees are elected for staggered four-year terms by a majority of qualified Hawaiian voters. *Id.* § 13D-3(b). Congress has ratified this exercise of Hawai'i's delegated federal authority by enacting laws that direct money and assign responsibilities to OHA. See, *e.g.*, 16 U.S.C. § 470w(18); 42 U.S.C. § 2991b-1.

SUMMARY OF ARGUMENT

The history of the Hawaiian people and of their relationship with the United States during the 19th century is outlined in the Background section. That history decisively demonstrates that Hawaiians are the Native Americans of Hawai'i. The legal analysis applicable to legislation mandating special treatment for Native Americans, including Hawaiians, is well established and deeply rooted in the Constitution. Application of that analysis to the law at issue—providing for the election of OHA trustees by Hawaiians—demonstrates that it is a manifestly appropriate exercise of Congress' broad authority to regulate relations with Native American groups and does not conflict with the Fourteenth Amendment.

The Founders understood that, as the United States extended its dominion, it would develop continuing relationships with the once-sovereign native peoples occupying its new territory, and the Constitution thus conferred upon Congress virtually plenary authority over relations with such peoples. In exercising that authority, Congress has often acknowledged that it has a special trust relationship with groups of indigenous people of the United States, resulting in part from the fact that the United States "took possession of [Indian] lands, sometimes by force, leaving them . . . needing protection." *Board of Comm'rs* v. *Seber*, 318 U.S. 705, 715 (1943). As a result, this Court has

routinely recognized that legislation "with respect to Indian tribes, although relating to Indians as such, is not based upon impermissible racial classifications." *United States* v. *Antelope*, 430 U.S. 641, 645 (1977). Instead, it is premised on native peoples' "unique legal" and "political" status, and within Congress' substantial discretionary power so long as it is "tied rationally" to the special or trust relationship. *Morton* v. *Mancari*, 417 U.S. 535, 547-55 (1974).

History reveals that Hawaiians were the aboriginal people of the State which is today Hawai'i, and that they were a culturally and geographically-unified people who governed themselves. It further demonstrates that the United States played a principal role in the Hawaiian people's loss of their sovereignty, land, and culture, and thereafter assumed and repeatedly acknowledged its special or trust relationship with the Hawaiian people. Finally, the historical narrative shows that Congress delegated to the State of Hawai'i, as a condition of its admission to the Union, authority to act in futherance of the federal trust obligation, and that the law at issue was enacted pursuant to that delegation.

In these circumstances, the law is premised on a political, rather than a racial, classification and is plainly constitutional. The political nature of the classification is highlighted by the fact that it neither fully encompasses nor fully excludes any race. Hawaiians are Polynesians, yet Polynesians who are not Hawaiian may not vote in the elections for OHA trustees; and the class termed Hawaiians is comprised of individuals of numerous racial backgrounds. This classification is primarily political in origin and purpose: It is intended to describe the aboriginal people of Hawai'i who were deprived of their sovereignty and their land by the United States.

ARGUMENT

LEGISLATION SPECIFIC TO THE HAWAIIAN PEOPLE FULFILLS THE UNITED STATES' SPECIAL OR TRUST OBLIGATION AND IN NO WAY OFFENDS THE CONSTITUTION.

Legislation specific to the aboriginal peoples of the United States is constitutional if it meets three requirements established by this Court's decisions. First, the group at issue must be a culturally and geographically-unified, indigenous people who governed themselves and inhabited land now within the United States. Second, the United States, by virtue of its historic conduct and present actions, must have established a special relationship with, or assumed a trust obligation toward, the group. Third, the legislation at issue must be "tied rationally" to fulfillment of the purposes of the special relationship or trust obligation, such as furtherance of the group's self-governance or self-sufficiency or preservation of the group's unique culture. See, *e.g.*, *Mancari*, 417 U.S. at 545-55; *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 83-85 (1977); *United States* v. *John*, 437 U.S. 634, 647-50 (1978). Legislation that satisfies these requirements employs "political" rather than "racial" classifications, *Mancari*, 417 U.S. at 553 n.24, and thus does not offend the Equal Protection Clause of the Fourteenth Amendment of the Constitution.[11] The legislation at issue in this case fulfills this Court's requirements.

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[11] Since *Mancari*, this Court has never overturned a statute or treaty upholding preferential or separate programs for, or treatment of, native peoples. *See Antoine* v. *Washington*, 420 U.S. 194, 207-08 (1975); *Fisher* v. *District Court*, 424 U.S. 382, 390-91 (1976); *Moe* v. *Confederated Salish and Kootenai Tribes of the Flathead Reservation*, 425 U.S. 463, 481-83 (1976); *Delaware Tribal Bus. Comm.* v. *Weeks*, 430 U.S. 73, 90 (1977); *United States* v. *Antelope*, 430 U.S. 641, 648-50 (1977); *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 502 (1979); *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 678-79 (1979); *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 696 (1979); *County of Oneida* v. *Oneida Indian Nation*, 470 U.S. 226, 253-54 (1985).

A. The Hawaiian People Are The Natives Of Hawai'i.

The Hawaiian people are the aboriginal people of Hawai'i. They are "Indians" within the meaning of the United States Constitution, because they are the native people of an area which is now part of the United States. See, *e.g.*, *Pence* v. *Kleppe*, 529 F.2d 135, 138 n.5 (9th Cir. 1976) ("the word 'Indian' is commonly used in this country to be 'the aborigines of America' "); Cohen, *supra* at 797-810 (same).[12] Congress has acknowledged that the Hawaiian people are "indigenous" people and that they "lived in a highly organized, self-sufficient, subsistent social system based on communal land tenure with a sophisticated language, culture, and religion." Apology Resolution at 1510. The Hawaiian people were fully self-governing prior to contact with the west in 1778, and the Kingdom of Hawai'i was sovereign, albeit subject to increasing American domination, until 1893. The historical record thus clearly shows that the Hawaiian people constitute a native group toward which the United States may assume a special or trust obligation. See *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) ("long continued legislative and executive usage and an unbroken current of judicial decisions have attributed to the United States . . . the power and the duty of exercising a fostering care and protection over all dependent Indian communities within its borders, whether within its original territory or territory subsequently acquired, and whether within or without the limits of a state").

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[12] *Accord Alaska Pac. Fisheries* v. *United States*, 248 U.S. 78, 87 (1918) (treating Alaskan natives as "Indians"). For a detailed demonstration that the Hawaiian people are Indians, *see* Brief of *Amici* Cook Inlet Region & Alaska Federation of Natives.

B. The United States Has Established A Special Or Trust Relationship With The Hawaiian People.

1. Equally clearly, the United States has in fact established a special or trust relationship with the Hawaiian people. This relationship is characteristic of relations between the United States and other previously sovereign Native American groups. After western contact, "[n]ative population fell drastically as traditional systems collapsed." Cohen, *supra* at 799. In addition, the United States "'overcame the [Hawaiian people] and took possession of their lands, sometimes by force, leaving them . . . needing protection.'" *Mancari*, 417 U.S. at 552.

Americans certainly played a substantial role in importing diseases that decimated the Hawaiian population, in the erosion of the native religion and the language and culture intertwined with it, and in the destruction of Hawai'i's system of communal land ownership. These actions laid the groundwork for the United States' increasing political sovereignty and economic domination in the islands, culminating in the United States' decisive participation in the illegal overthrow of Hawai'i's constitutional monarchy, its annexation of Hawai'i, and its possession of 1,800,000 acres of public land in Hawai'i "without the consent of or compensation to" the Hawaiian people. Apology Resolution at 1512.

History thus provides a firm basis for a special or trust relationship between the United States and the Hawaiian people, and the United States has on numerous occasions acknowledged that such a relationship exists. See *supra* at 17-20.

2. In response, petitioner asserts that, as a matter of law, the United States may not establish a special or trust relationship with the Hawaiian people. His claim is that the United States may establish such relationships only with Indian *tribes*; that the Hawaiian people are not a tribe within the meaning of the Constitution; and therefore that neither the United States nor its delegatee may enact legislation specific to them. The premise of this argument is wrong and so, hence, is its conclusion.

In cases implicating the United States' special or trust relationship with Indians, this Court has expressly held that Congress' authority to enter into such relationships extends beyond federally-recognized Indian tribes. In both *Weeks*, 430 U.S. at 84, and *John*, 437 U.S. at 651-54, this Court rejected Equal Protection challenges to preferences for Indians who were not formally members of any tribe. In *Weeks*, the Court upheld a federal statute distributing assets to the heirs of members of two tribes, without regard to whether the heirs were themselves tribal members, because the legislation "'fulfill[ed] . . . Congress' unique obligation toward the Indians.'" 430 U.S. at 85 (quoting *Mancari*, 417 U.S. at 55). And in *John*, the Court held that Congress could create a separate criminal jurisdiction applicable to nontribal Indians in Mississippi. Observing that these Indians were only a "remnant of a larger group of Indians" which had moved to Oklahoma and "cannot now be regarded as a tribe," the Court nonetheless authorized special treatment of the group based, in part, on the possibility that it might again become a separate legal entity. Id. at 650 n.20, 653 (internal quotation marks omitted).

These cases make plain that the *Mancari* rule is not limited to legislation affecting federally-recognized Indian tribes. Instead, it applies whenever Congress assumes a special or trust obligation toward a native people which can be historically justified. The Hawaiian people are the descendants of a sovereign, geographically and culturally-unified group toward which the United States has assumed a special or trust relationship.[13] Moreover, they are, with

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[13] Because the Hawaiian people were self-governing and geographically and culturally-unified prior to western contact, Congress

the support and assistance of the United States government and the State of Hawai'i, in the process of regaining some measure of self-government, tribal land, and self-sufficiency. See also Hon. Samuel P. King, *Hawaiian Sovereignty*, Haw. B. J. 6 (July 1999). In these circumstances, legislation that is specific to the Hawaiian people and rationally related to fulfillment of the special or trust obligation, see *infra*, is clearly constitutional.

Petitioner's argument, in essence, is that the United States may enter into a special or trust relationship only with groups of native peoples who have continuously retained some modicum of federally-recognized sovereignty. Put differently, the argument is that the Constitution gives Congress *less* constitutional authority to recognize its obligations toward a native people whose sovereignty it destroyed and whose lands it has taken without compensation, than toward a native people with whom it has left some remnant of its power and its land. This argument finds no support in decisions of this Court, in the Constitution, or in justice, and should be rejected.[14]

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has the authority to treat them as descendants of a "tribe" (or as in the process of re-establishing a "tribe") within the meaning of the Constitution. *See* U.S. Const. art. I, § 8, cl. 3 (conferring upon Congress the power to regulate commerce "with the Indian tribes"). "The term tribe has no universal legal definition. There is no single federal statute defining an Indian tribe for all purposes." Cohen, *supra* at 3. Congress unquestionably has broad power to decide whether a group was, is, or may again be, a tribe for purposes of exercising its power under the Indian Commerce Clause. *See Sandoval*, 431 U.S. at 46-47.

[14] Petitioner seems to argue that the United States could not establish a special or trust relationship with the Hawaiian people, because the latter have had the right to vote since Hawai'i became a territory of the United States. Br. at 42-43. This argument is plainly wrong. All Native Americans have had the right to vote since 1924, *see* Act of June 2, 1924, Pub. L. No. 68-175, 43 Stat. 254 (1924); and the United States nonetheless continues to have a trust obligation toward them. *See, e.g., John*, 437 U.S. at 652-53.

C. The Legislation At Issue Is Tied Rationally To Fulfillment Of The Special Or Trust Obligation.

The final requisite for the constitutionality of legislation which is specific to Hawaiian people is that "the special treatment . . . be tied rationally to the fulfillment of Congress' unique obligation." *Mancari*, 417 U.S. at 555. Petitioner contends that the legislation limiting voter eligibility to Hawaians in elections for OHA trustees does not satisfy this standard. He asserts that the provision is *state* legislation that lacks federal authorization. In addition, he maintains that, even assuming the law is within the State's delegated authority, it does not fulfill the purposes of the special or trust relationship. Both assertions are wrong.

First, this Court has clearly held that state laws enacted under the authority of federal legislation are to be treated as expressions of the federal trust responsibility and should be judged by the standards used in evaluating federal law. See *Washington* v. *Confederated Bands and Tribes of the Yakima Indian Nation*, 439 U.S. 463, 499-502 (1979). In the Admission Act of 1959, Congress expressly delegated to the State part of its authority to further the special or trust relationship with the Hawaiian people. Most relevant here, it ceded public lands back to the State in trust to be used for five purposes, including the "betterment of the conditions of native Hawaiians." Admission Act at 6 (§ 5(f)).

To carry out its delegated responsibility with respect to the public land trust, Hawai'i amended its Constitution to establish OHA, whose primary responsibility is administration of a pro rata share of the revenues generated by the public land trust for the *federally-authorized purpose* of "better[ing] the conditions of native Hawaiians." The state law provision at issue was thus enacted pursuant to an express federal delegation of responsibility for admin-

istration of the public land trust and Hawai'i's decision to establish OHA has been ratified by Congress on numerous occasions. See *supra* at 20. It must therefore be judged by the standards applicable to federal laws intended to fulfill a special or trust obligation.

Second, the State's specification of a Hawaiian electorate to elect the trustees who will administer trust funds for the benefit of the Hawaiian people furthers Congress' special relationship with the Hawaiian people. It fosters "self-government" and makes the trustees "more responsive to the interests of the people [the trust and the OHA] w[ere] created to serve." *Mancari*, 417 U.S. at 543, 554. Petitioner's assertion that a trustee elected by an electorate would have a fiduciary duty with respect to his or her trust obligation is correct, but beside the point. The critical question is whether the legislative decision to foster self-determination in this way is reasonably deemed to fulfill the delegated federal obligation to the Hawaiian people. Plainly, it is.

D. Legislation Specific To The Hawaiian People Is Premised On A "Political," Not A Racial, Classification.

As demonstrated above, the legislation at issue is premised on a political classification and thus does not violate the Equal Protection Clause. The political nature of the classification here is further illuminated by the fact that it neither fully encompasses nor fully excludes any racial group. For example, the Hawaiian people are members of the Polynesian family of peoples, which includes people of many national origins. See *supra* at 4-5. Preferences for the Hawaiian people, however, do not extend to other Polynesians. See *Mancari*, 417 U.S. at 553 n.24 (the classification "operates to exclude many individuals who are racially classified as 'Indians' "). Equally to the point, although a Hawaiian has at least one Hawaiian ancestor and a unique heritage and history, a Hawaiian may be a

member of any of a number of "races." For example, *amicus* Kamehameha Schools give preference in admission to applicants with at least one Hawaiian ancestor, but the Schools are attended by students of many "races."

To be sure, the classification, like the classification at issue in *Mancari* and its progeny, has a component that is related to race—the requirement of descent from the sovereign people who occupied the Hawaiian islands prior to 1778, all of whom were members of a branch of the Polynesian family. But that component is designed not to designate a race, but rather to describe the aboriginal people deprived of sovereignty and land by the United States. The point is not that special treatment of indigenous people lacks any racial aspect, but rather that it is primarly political in origin and object and that, with respect to the Hawaiian people, the classification does not correspond in a coherent or practical way with the preference or exclusion of a particular "race."

Petitioner, however, contends that the intent of Congress and the State of Hawai'i to discriminate on the basis of race is revealed by the decision to define the Hawaiian people as descendants of those who lived in the islands in 1778 when the first westerner, Captain Cook, arrived, rather than in 1893, when the Kingdom was overthrown. The delineation of the aboriginal group with which the United States has established a special or trust relationship is, of course, for Congress, so long as its definition is not arbitrary. Cf., *e.g.*, *Sandoval*, 231 U.S. at 46. Congress' selection of 1778—the date of Hawai'i's first western contact—was entirely reasonable, in light of the historical experience of the Hawaiian people from that date through 1893.

The story of 19th century Hawai'i is the story of the Hawaiian people's losses—the loss of population, the end of their communal economic system, the crumbling of

their religion and culture, and the erosion of their political sovereignty. These losses were in substantial measure the result of the United States government's growing political and economic dominance in Hawai'i. Petitioner's account of 19th century Hawai'i is thus entirely ahistorical and misleading. Congress clearly had the power to select the date of western contact as the moment at which the Hawaiian people were a fully self-governing people in control of their economy, land, and culture, and to assume a special or trust obligation toward the descendants of that indigenous people.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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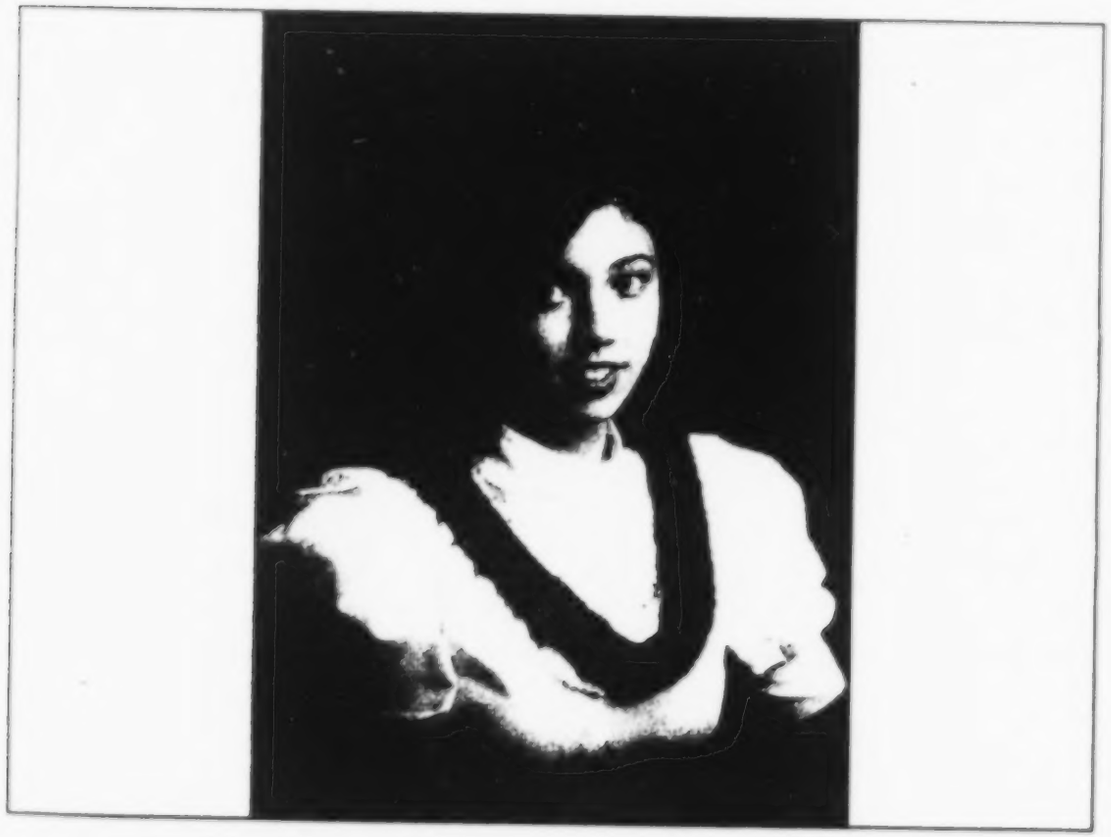
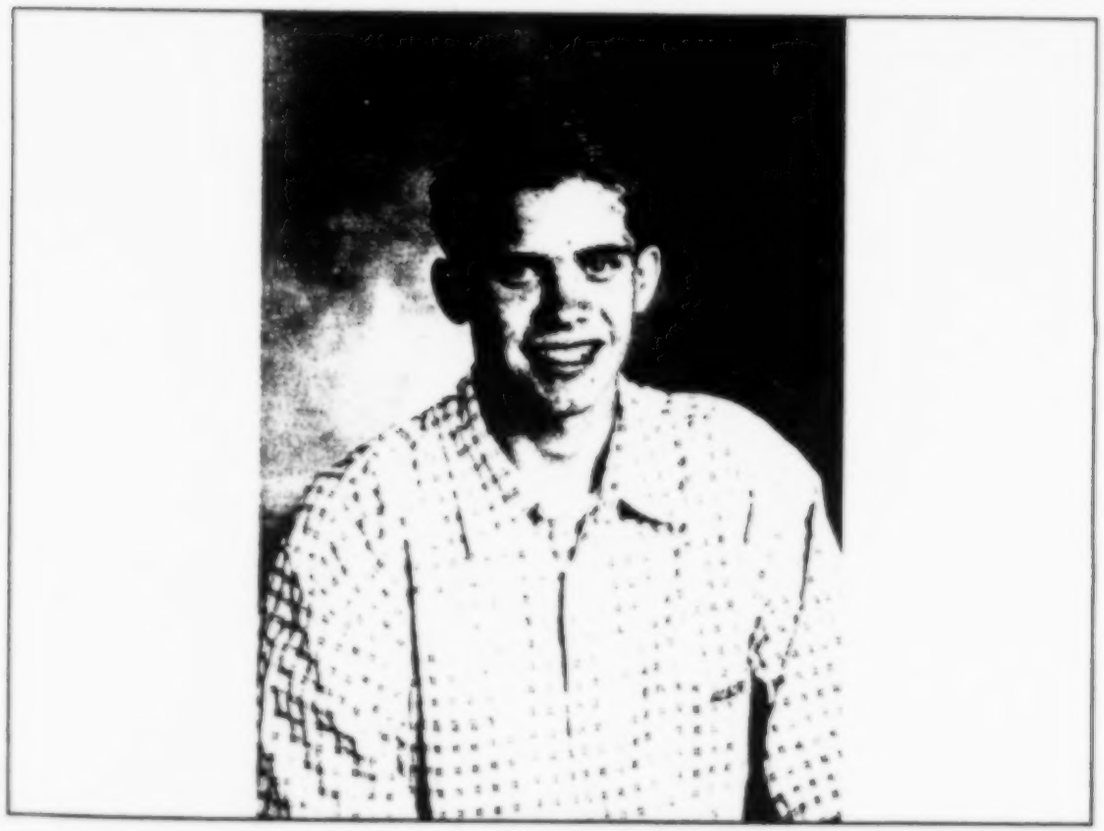
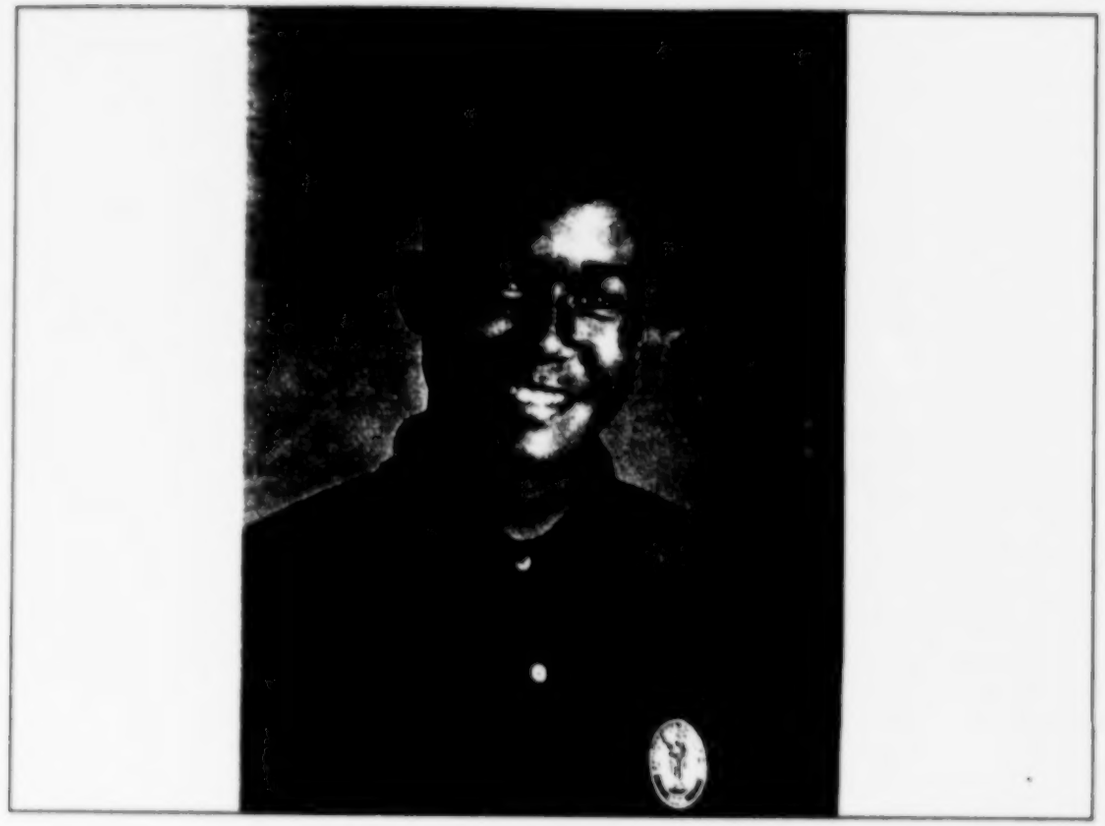
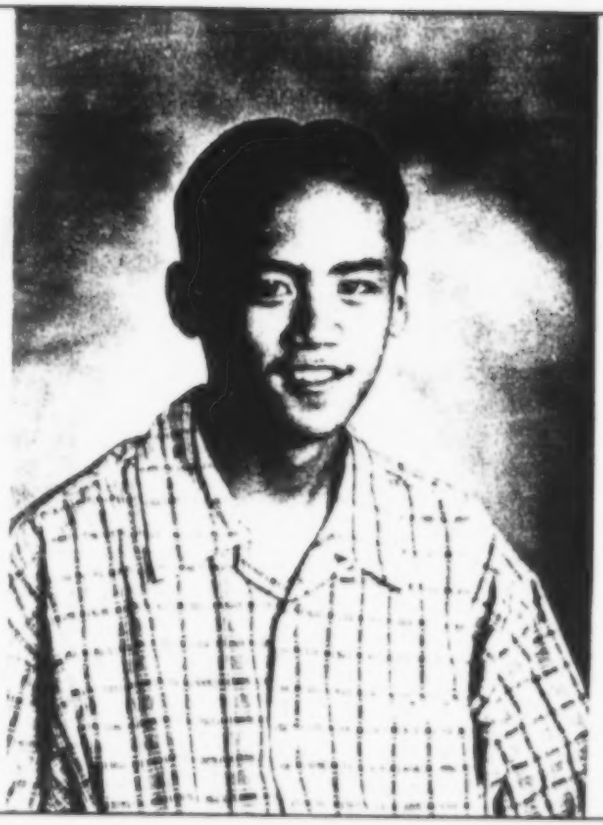
July 28, 1999

APPENDIX A









Supreme Court, U.S.
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No. 98-818

In The

Supreme Court of the United States

HAROLD F. RICE,

Petitioner,

v.

BENJAMIN J. CAYETANO, GOVERNOR OF THE STATE OF HAWAII,

Respondent.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

BRIEF *AMICUS CURIAE* OF THE NATIONAL CONGRESS OF AMERICAN INDIANS IN SUPPORT OF THE RESPONDENT

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INTEREST OF AMICI CURIAE[1]

The National Congress of American Indians (NCAI) is the oldest, largest, and most representative American Indian and Alaska Native Organization in the United States. NCAI is dedicated to protecting the rights and improving the welfare of all indigenous peoples in the United States, to enlightening the public toward a better understanding of indigenous peoples, and to preserving indigenous rights. NCAI believes that Native Hawaiians are an indigenous people and that certain rights flow from that status.

SUMMARY OF ARGUMENT

The Indian Commerce Clause of the United States Constitution, U.S. Const. art. I, § 8, cl. 3, vests the federal government with the authority and flexibility to deal with all indigenous peoples within its geographical boundaries. Throughout this Nation's history, this Court has deferred to the political branches as to which peoples will be dealt with under the Indian Commerce Clause, subject only to this Court's oversight to ensure that no arbitrary characterization is made simply to bring a people under this power. *See United States v. Sandoval*, 231

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[1] The parties have consented in writing to the filing of this brief in letters that have been submitted to the Clerk. *See* Sup. Ct. R. 37.3(a). Pursuant to Rule 37.6 of the Rules of this Court, *amici* state that no counsel for a party authored this brief in whole or in part, and that no person or entity other than *amici* and their counsel made any monetary contribution to the preparation or submission of this brief.

U.S. 28, 47 (1913). The political branches of the federal government recognize the people indigenous to Hawai'i as coming within the terms of the Indian Commerce Clause and that decision is eminently reasonable.

The federal government has a "special relationship" with the indigenous peoples of the United States which insulates federal legislation dealing with those peoples from equal protection challenges "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . ." *Morton v. Mancari*, 417 U.S. 535, 555 (1974). This rule applies whether the legislation deals with members of a federally recognized tribe or not. *See e.g., Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977).

The Fifteenth Amendment was not intended to affect the federal power to deal with indigenous peoples in any way. In practice, the federal government has authorized and funded hundreds of elections in which voting was restricted to indigenous peoples. If the Fifteenth Amendment were held to prohibit these elections, the ability of the federal government to carry out the responsibilities of its "special relationship" with indigenous peoples would be nullified.

Federal authority to deal with indigenous peoples may also be delegated to the states and state action can be ratified by Congress. *See Washington v. Yakima Indian Nation*, 439 U.S. 463, 470-471 (1979). Congress has recognized Native Hawaiians as an indigenous people, has instructed the State of Hawai'i to use the resources from lands transferred to the State in 1959 for the betterment of

the conditions of the Native Hawaiian people, and has otherwise encouraged and endorsed Hawai'i's efforts to better their condition. Because Hawai'i's actions at issue in this case are consistent with actions taken by Congress, they are subject to and easily satisfy the *Mancari* test. *See id.* at 500-01.

ARGUMENT

I. THE CONSTITUTION EMPOWERS CONGRESS TO DEAL WITH ALL INDIGENOUS PEOPLES IN THE UNITED STATES

A. Introduction

When Columbus landed in the "New World" he encountered its indigenous peoples. Thinking that he had arrived in Asia, he referred to the indigenous peoples he encountered as "los Indios" – the Indians. *See* Robert F. Berkhofer, Jr., *The White Man's Indian*, 4-5 (1978). Although

> [t]he first residents of the Americas were by modern estimates divided into at least two thousand cultures and more societies, practiced a multiplicity of customs and lifestyles, held an enormous variety of values and beliefs, spoke numerous languages mutually unintelligible to the many speakers, and did not conceive of themselves as a single people – if they knew about each other at all. . . . [w]hites categorized the variety of cultures and societies as a single entity for the purposes of description and analysis. . . .

Id. at 3. These peoples constituted independent sovereigns whose existence predated the coming of the Europeans. *See Worcester v. Georgia*, 31 U.S. (6 Pet.) 515, 542 (1832); *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851 (1985). The European nations dealt with these peoples primarily through treaties "formed as near as may be, on the model of treaties between the crowned heads of Europe." *Worcester*, 31 U.S. (6 Pet.) at 550. After the colonies achieved independence, "Congress assumed the management of Indian affairs; first in the name of these United Colonies, and afterward in the name of the United States." *Id.* at 558.

Article IX of the Articles of Confederation gave the "United States in Congress assembled the sole and exclusive right of 'regulating the trade and managing all the affairs with the Indians, not members of any of the States: provided that the legislative power of any State within its own limits be not infringed or violated.' " *Id.* at 558-559. This inherently contradictory language was so construed by some states as to annul the power itself. *Id.* at 559.

The problems created by the language of the Articles were resolved in the United States Constitution. The states ceded to the federal government the exclusive power to make treaties. *See* U.S. Const. art. I, § 10, art. II, § 2, cl. 2, and the power to "regulate Commerce . . . with the Indian Tribes," *Id.* at art. I, § 8, cl. 3. *See also Worcester* at 561; *McClanahan v. Arizona Tax Comm'n.*, 411 U.S. 164, 172 n.7 (1973) (stating that federal authority derives from commerce and treaty provisions).

The dispute surrounding this case, in its broadest sense, is whether the indigenous people of Hawai'i fall

within the Indian Commerce Clause, U.S. Const. art. I, § 8, cl. 3, as a people with whom the federal government may separately deal on a political basis. Petitioner, adopting a technical and restrictive reading of the Indian Commerce Clause, argues that the Clause does not extend to the indigenous people of Hawai'i because they are different from other indigenous peoples of the United States. This restrictive reading of the Indian Commerce Clause is inconsistent with a proper interpretation of the Constitution.

The indigenous peoples with which the framers of the Constitution were familiar were referred to as Indians and their political organizations denominated "nations" or "tribes." *See* Harold E. Driver, *Indians of North America*, 299-302 2d ed. (1969). The reference to Indian tribes in the Indian Commerce Clause was thus a natural one. But the ultimate geographical limits of the United States were unknowable at that time, as was the variety of indigenous peoples that occupied the Americas. *See id.* at 287-308. Subsequent to the adoption of the Constitution, Euro-Americans encountered indigenous peoples who were not ethnically Indian and whose organizational structures differed from that of eastern tribes. The Constitution has nonetheless proven flexible enough to encompass relations with all indigenous people within the geographic limits of the United States. This is as it should be with a document "to use the words of Chief Justice Marshall, 'designed to approach immortality as nearly as any human institution can approach it.' " *Weems v. United States*, 217 U.S. 349, 373 (1910). Were it otherwise, Congress would have been embarrassed in its dealings with

indigenous peoples long before Hawai'i entered the Union.

B. Federal Dealings with Indigenous Peoples Regardless of Differences in Land Tenure, Level of Organization, or Ethnicity are Given Great Deference by This Court

As the following discussion will demonstrate, Congress has historically exercised great flexibility in its dealings with indigenous peoples and this Court generally defers to such action.

1. The Case of the Pueblos of the Southwest

United States v. Sandoval, 231 U.S. 28 (1913), is instructive on two levels. It provides a specific example of flexibility in determining the reach of the Indian Commerce Clause, and further demonstrates the deference this Court has shown the political branches in its dealing with indigenous peoples. In *Sandoval*, the question was whether the Santa Clara Pueblo was Indian country for purposes of federal jurisdiction – whether the Pueblo were Indians within the meaning of the Indian Commerce Clause. *See id.* at 38. The Pueblo, unlike some other Indians, were a sedentary and agricultural people, and the Pueblo owned its land in communal fee simple under grants from the King of Spain which were confirmed by Congress.[2] *See id.* at 39-40. These differences did not bar

[2] The members of the Pueblo also made a claim to citizenship. *See Sandoval*, 231 U.S. at 48. The claim to citizenship

federal authority under the Indian Commerce Clause. The Pueblos' title to their land "was not fee simple title in the commonly understood sense of the term. Congress had recognized the Pueblos' title to their lands by statute, and Executive orders had reserved additional public lands 'for the [Pueblos'] use and occupancy.' " *Alaska v. Native Village of Venetie*, 522 U.S. 520, ___, 118 S. Ct. 948, 953 (1998). In addition, Congress had enacted legislation with respect to the lands 'in the exercise of the Government's guardianship over th[e] [Indian] tribes and their affairs,' including . . . restrictions on the lands' alienation." *Id.* at 48. "Congress *therefore* could exercise jurisdiction over the Pueblo lands, under its general power over 'all dependent Indian communities within its borders, whether within its original territory or *territory subsequently acquired*, and whether within or without the limits of a State.' " *Id.* (characterizing *Sandoval*) (emphasis added).

In other words, Congress had in the past treated Pueblos as Indians and the Court would defer to that determination, subject to one caveat:

> Of course, it is not meant by this that Congress may bring a community or body of people within the range of this power by arbitrarily calling them an Indian tribe, but only that in

was not passed upon because the Court felt that "citizenship is not in itself an obstacle to the exercise by Congress of its power to enact laws for the benefit and protection of tribal Indians as a dependent people." *Id.* This effectively undermines petitioner's attempt to distinguish between Native Hawaiians and other indigenous peoples based on Native Hawaiians' citizenship from the date of annexation. Petitioner's Brief at 42-43, *Olson* (No. 98-818).

> respect of distinctly Indian communities the questions whether, to what extent, and for what time they shall be recognized and dealt with as dependent tribes requiring the guardianship and protection of the United States are to be determined by Congress, and not by the courts.

Sandoval, 231 U.S. at 46.

The Court in *Sandoval* was following long-established precedent in granting deference to the political branches in these matters. *United States v. Holliday*, 70 U.S. (3 Wall.) 407 (1866); *The Kansas Indians*, 72 U.S. (5 Wall.) 737 (1867). The same deference the Court showed to the political branches in *Sandoval* is appropriate here, where there is no question that Native Hawaiians are an indigenous people who, until federal complicity in its overthrow, were organized into an independent kingdom.

2. The Indian Commerce Clause Extends to Indigenous Peoples Irrespective of Their Organization As Tribes

Petitioner argues that Native Hawaiians should be excluded from the general rules of Indian law because they lack a political organization along tribal lines and this distinguishes them from Indians. Petitioner's Brief at 39, *Olson* (No. 98-818). But this distinction is irrelevant. Many Indians had political organizations much different from those of the eastern tribes. *See* Driver, *supra*, at 287-308. Some had "little or no tribal organization." *Washington v. Fishing Vessel Ass'n*, 443 U.S. 658, 664 (1979). In California, "tribes" in the political sense may not have existed. *See* Driver, *supra*, at 295. In *United States v. Washington*, the court noted that:

> One writer maintains: 'Tribe is most appropriately a cultural concept. Except for some eastern woodland confederacies, few Indians had tribal organizations that governed their activities.' G. Taylor, *The New Deal and American Indian Tribalism* 2 (1980).
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> See also Elser v. Gill Net Number One, 246 Cal.App.2d 30, 38, 54 Cal. Rptr. 568, 575 (1966) ('tribe,' applied to California Indians, must be understood as synonymous with ethnic group rather than as denoting political unity because tribes in a political sense did not exist in California . . .)

641 F.2d 1368, 1373 n.6 (9th Cir. 1981) (internal quotes omitted).

Yet, as this country expanded westward, contact with Indians who lacked the political organization characteristic of the eastern tribes proved no impediment to federal dealings with them: "[T]he record shows that the territorial officials who negotiated the treaties on behalf of the United States took the initiative in aggregating certain loose bands into designated tribes and even appointed many of the chiefs who signed the treaties." *Fishing Vessel Ass'n*, 443 U.S. at 664 n.5.

As pointed out in the *Handbook of Federal Indian Law*: "Congress has created 'consolidated' or 'confederated' tribes consisting of several ethnological tribes, sometimes speaking different languages."[3] Felix S. Cohen, *Handbook*

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[3] "Examples are the Wind River Tribes (Shoshone and Arapahoe), the Cheyenne-Arapaho Tribes of Oklahoma, the Cherokee Nation of Oklahoma (in which the Cherokees,

of Federal Indian Law, 6 (1982 ed.). A specific example of consolidation is mentioned in *Washington v. Yakima Nation*:

> The Confederated Bands and Tribes of the Yakima Indian Nation comprise 14 originally distinct Indian tribes that joined together in the middle of the 19th century for purposes of their relationships with the United States. A treaty was signed with the United States in 1855, under which it was agreed that the various tribes would be considered 'one nation' and that specified lands would be set aside for their exclusive use.

439 U.S. 463, 469 (1979). "On the other hand, Congress has sometimes divided a single tribe, from the ethnological standpoint, into a number of tribes or 'bands.'" Cohen, *supra*, at 6.[4]

The Indian Reorganization Act, 25 U.S.C. §§ 461-479, provides a mechanism for the creation of tribes. Section 19 defines "Indian" to include members of recognized

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Delawares, Shawnees and others were included), and the Confederated Salish and Kootenai Tribes of the Flathead Reservation." Cohen, *supra*, at 6.

[4] "Examples are the Chippewas, the Sioux, and several groups which remained behind when the majority of their members were removed west during the mid-nineteenth century." *See, e.g., United States v. John*, 437 U.S. 634 (1978) (Choctaws remaining in Mississippi after most moved west); *Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73 (1977) (Delaware Tribe divided into 'Kansas Delawares' and 'Absentee Delawares'); *United States v. Boyd*, 83 F. 547 (4th Cir. 1897) (Eastern Band of Cherokees in North Carolina a 'tribe' even though main body of tribe had moved to Oklahoma)." *Id.* at 6 n.26.

Indian tribes as well as "all persons who are descendants of such members who were, on June 1, 1934, residing within the present boundaries of any Indian reservation, and . . . all other persons of one-half or more Indian blood. . . . " and further provides that "The term 'tribe' wherever used in [this Act] shall be construed to refer to any Indian tribe, organized band, pueblo, or the Indians residing on one reservation." 25 U.S.C. § 479 (1994).

This provision, along with other provisions of the Act, has been used as a basis to form new tribes. Section 5 of the Indian Reorganization Act provides that the

> Secretary of the Interior is hereby authorized, in his discretion, to acquire through purchase, relinquishment, gift, exchange, or assignment, any interest in lands, . . . within or without existing reservations, . . . for the purpose of providing land for Indians. . . . Title to any lands or rights acquired pursuant to [this Act] shall be taken in the name of the United States in trust for the Indian tribe *or individual Indian* for which the land is acquired . . .

25 U.S.C. § 465 (1994) (emphasis added). Once individuals become beneficiaries of land held in trust they can organize themselves as a government and, as a 'reservation' tribe or band, become eligible for organization under the IRA. Cohen, *supra*, at 15.[5]

Congress has also legislated as to groups of indigenous peoples which had no tribal status and for whom

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[5] *See* Cohen, *supra*, at 15 and n.86 for a listing of tribes for whom this procedure has been followed.

tribal status was never intended. The Indian Claims Commission Act (ICCA) was passed to provide a remedy for many of the injustices suffered by the indigenous peoples of the United States. The Act provided that, "[t]he Commission shall hear and determine the following claims against the United States on behalf of any Indian tribe, band, or other identifiable group of American Indians residing within the territorial limits of the United States or Alaska. . . . " Indian Claims Commission Act, ch. 959, 60 Stat. 1049 (1946). The Justice Department, charged with defending these claims, early on argued that to come within the statute, any group had to "possess the characteristics of a 'tribe' or 'band,' which are, mainly, a common government or leadership, continuity of existence and concert of action." *Loyal Creek Band or Group of Creek Indians v. United States*, 1 Indian Cl. Comm. 122, 127 (1949). The Commission and Court of Claims rejected the Government position and held that if "the group can be identified and it has a common claim, it is . . . an 'identifiable group of American Indians' " and can bring a claim under the ICCA. *Id.* at 129 (1949). *See also Peoria Tribe v. United States*, 169 Ct. Cl. 1009 (1965); *Nooksack Tribe v. United States*, 162 Ct. Cl. 712 (1963), *cert. denied*, 375 U.S. 993 (1964).

This Court has likewise recognized the obligations, under federal legislation, of newly formed bands of Indians that were not tribes. The Indian Depredations Act of 1891 gave to the Court of Claims jurisdiction over "[a]ll claims for property of citizens of the United States taken or destroyed by Indians belonging to any band, tribe, or nation, in amity with the United States, without just cause or provocation on the part of the owner or

agent in charge, and not returned or paid for." Act of Mar. 3, 1891, ch. 538, § 1, 26 Stat. 851. The question arose as to whether, when only a portion of a tribe committed depredations, the tribe from which the band had separated was liable for the depredations. In *Montoya v. United States*, 180 U.S. 261, 269-270 (1901), members of several tribes formed a new band and the Court found them to fall within the statute.

Thus, historically, federal dealings with this country's indigenous peoples has never depended upon their organization into tribes. Petitioner's attempt to distinguish the situation in Hawai'i because of the present lack of a federally recognized tribe is unavailing.

3. The Indian Commerce Clause Extends to All of The Indigenous Peoples of Alaska, Some of Whom, Like Native Hawaiians, Are Not Ethnically Indian

"The term 'Natives of Alaska' has been defined to include all members of the aboriginal races inhabiting Alaska at the time of its annexation to the United States, and their descendants."[6] Felix S. Cohen, *Handbook of Federal Indian Law*, 401 (1942 ed.) [hereinafter Cohen, 1942

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[6] The following are some of the statutory provisions defining ["Natives of Alaska"]:

The Act of June 25, 1938, 52 Stat. 1169, amending the Alaska game law, defines "Indian" to include "Natives of one-half or more Indian blood," and "Eskimo" to include "Natives of one-half or more Eskimo blood."

Sec[tion] 2 of the Act of April 16, 1934, 48 Stat. 594, 596, which grants special fishing privileges to "native Indians," defines "native Indians" to mean "members of the aboriginal

Handbook]. Alaska's aboriginal races include Eskimos, which are distinct from Alaska's two other aboriginal groups, Indians and Aleuts. *See id.*

That Congress' power extended to the aboriginal peoples of Alaska in the same manner that it applied to Indians in the contiguous 48 States is reflected in the 1867 Treaty of Cession, by which the United States acquired Alaska from Russia. The third article of that Treaty provided in pertinent part:

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races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood."

Section 15 of the Reindeer Act of September 1, 1937, 50 Stat. 900, 902, defines the term "natives of Alaska" as meaning –

> the native Indians, Eskimos, and Aleuts of whole or part blood inhabiting Alaska at the time of the Treaty of Cession of Alaska to the United States and their descendants of whole or part blood, together with the Indians and Eskimos who, since the year 1867 and prior to the enactment hereof, have migrated into Alaska from the Dominion of Canada, and their descendants of the whole or part blood.

Sec[tion] 19 of the [Indian Reorganization] Act of June 18, 1934, 48 Stat. 984, 988, provides: "For the purposes of this Act, Eskimos and other aboriginal peoples of Alaska shall be considered Indians."

C. 80, section 142 of the Penal Code of Alaska, Act of February 6, 1909, 35 Stat. 600, 603, which makes the sale of liquor to Indians a crime, provides:

> That the term "Indian" . . . shall be construed to include the aboriginal races inhabiting Alaska when annexed to the United States, and their descendants of the whole or half blood, who have not become citizens of the United States.

Felix S. Cohen, *Handbook of Federal Indian Law*, 401 n.1 (1942 ed.).

> The inhabitants of the ceded territory . . . [may] remain in the ceded territory [and], with the exception of the uncivilized native tribes, shall be admitted to the enjoyment of all the rights, advantages and immunities of citizens of the United States. . . . The uncivilized tribes will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

Cohen, 1942 *Handbook, supra*, at 402. That provision was interpreted in *In re Minook*, as giving "the Indian tribes of Alaska the same status before the law as those of the United States." 2 Alaska 200, 221 (D. Alaska 1904).[7]

Later opinions by the Interior Department Solicitor General's Office confirmed that Alaska Natives were subject to the same principles that apply to Indians in the contiguous 48 States. For instance, in 1923, the Solicitor issued an opinion describing the status of Alaska Natives which concluded that "[t]he relations existing between [the Alaska Natives] and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the United States. . . . " 49 I.D. 592, 593 (May 18, 1923) *reprinted in* 2 Opinions of the Sol. of the Dep't of the Interior Relating

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[7] Other decisions from that era analogizing the legal status of Alaska Natives to that of Indians generally include *Nagle v. United States*, 191 F. 141 (1911) (Native Alaskans eligible for General Allotment Act citizenship provision) and *United States v. Berrigan*, 2 Alaska 442 (D. Alaska 1905) (describing United States' relationship to Native Alaskans as that of "guardian" to "dependent ward" and prohibiting disposition of Native land to non-natives without federal approval).

to Ind. Affairs [hereinafter Sol. Op. On Ind. Affairs] 207, 6. This view was reaffirmed nine years later in a comprehensive Solicitor's Opinion on the "Status of Alaska Natives," which was submitted to Congress in 1932. *See* 1 Sol. Op. On Ind. Affairs 303. The 1932 Opinion concluded that:

> From the foregoing it is clear that no distinction has been or can be made between the Indians and other natives of Alaska so far as the laws and relations of the United States are concerned whether the Eskimos and other natives are of Indian origin or not *as they are all wards of the Nation, and their status is in material respects similar to that of the Indians of the United States.*

Id. at 310 (Emphasis added). *See also* "Validity of Marriage by Custom Among the Natives or Indians of Alaska," 54 I.D. 39 (Sept. 3, 1932), *reprinted in* 1 Sol. Op. On Ind. Affairs 329 (opining that marriage among Alaska Natives maintaining their tribal relations should be governed by the laws and customs of the Alaska Native tribes).

In 1942, Felix Cohen set forth the Department of the Interior's view of the legal status of Alaska Natives as follows:

> It is now substantially established that [Alaska Natives] occupy the same relation to the Federal Government as do the Indians residing in the United States; that they, their property, and their affairs, are under the protection of the federal Government; that Congress may enact such legislation as it deems fit for their benefit and protection; and that the laws of the United States with respect to the Indians resident within the boundaries of the United States

> proper are generally applicable to the Alaska natives.

Cohen, 1942 *Handbook, supra,* at 404.

This backdrop of legal opinion is significant given the absence of treaties and the existence of only a few reservations in Alaska. It is also significant given that the political status of Alaska Natives tribes *qua* tribes had not yet been clarified.[8] The Solicitor's conclusions establish the existence of the basic underlying special relationship, and therefore, the constitutional bases for specific acts of Congress and the Executive.

The Court recognized in *Sandoval* that Congress cannot arbitrarily extend its power under the Indian Commerce Clause to peoples that are not in fact indigenous. There has never been a suggestion that the exercise of federal power over all of the aboriginal peoples of Alaska runs afoul of the Indian Commerce Clause. To the contrary, this Court in *Alaska v. Native Village of Venetie* recognized Congress' power over Alaska Natives by stating that "[whether] the concept of Indian country should be modified is a question entirely for Congress." 522 U.S. at

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[8] Indeed, the political status of Alaska Native villages as tribes was only clarified in 1993 with the issuance of a List of Federally Recognized Tribes which acknowledged more than 200 Alaska Native villages as federally recognized sovereign tribes. *See* 58 Fed. Reg. 54,364 (1993). The Secretary explained that "[t]he purpose of the current publication is to publish an Alaska list of entities conforming to the intent of 25 C.F.R. 83.6(b) [(1993)] and to eliminate any doubt . . . [as to whether] the villages and regional tribes listed below are distinctly Native communities and have the same status as tribes in the contiguous 48 states." 58 Fed. Reg. 54,365 (1993).

___, 118 S. Ct. at 956. So too, the question whether a "special relationship" exists between the United States and Native Hawaiians is "a question entirely for Congress." *Id.*

II. FEDERAL LEGISLATION CONCERNING NATIVE HAWAIIANS NEED ONLY BE RATIONALLY RELATED TO CONGRESS' UNIQUE OBLIGATION TO INDIGENOUS PEOPLES

The Federal Government has, through extensive legislation and course of dealings, established a "special relationship" with the indigenous peoples of the United States. This special relationship protects such legislation from the same scrutiny that applies to legislation dealing with other minorities. *See Morton v. Mancari*, 417 U.S. 535, 553-54 (1974). Petitioner argues that the standard of review enunciated in *Mancari* applies only to legislation dealing with Indians who are members of a federally recognized Indian tribe, Petitioner's Brief at 39, *Olson* (No. 98-818), and that all other such legislation is subject to strict scrutiny in ascertaining whether it violates equal protection. *Mancari* does not so hold, and the cases of this Court are all to the contrary.

A. *Mancari* Involved Members of Federally Recognized Tribes and Did Not Speak to the Issue of Non-Members

In *Mancari*, non-Indian employees of the Bureau of Indian Affairs challenged an employment preference for Indians, which was authorized by the Indian Reorganization Act (IRA) of 1934, 25 U.S.C. §§ 461-479 (1994). *See*

Mancari, 417 U.S. at 538-39. The scope of the authorized preference was restricted by BIA policy to those Indians of "one-fourth or more degree Indian blood and . . . a member of a Federally-recognized tribe." *Id.* at 553 n.24 (citing 44 BIAM 335, 3:1). The non-Indian employees challenged the preference as constituting invidious racial discrimination in violation of the Due Process Clause of the Fifth Amendment. *See id.* at 539.

The Court recognized two Constitutional bases for Congressional legislation passed for the benefit of Indians. First, the Constitution "singles Indians out as a proper subject for separate legislation," in article I, section 8, clause 3 which provides Congress with the power to "regulate Commerce . . . with the Indian Tribes." *Id.* at 552. Second, the federal government made treaties with the tribes under article II, section 2, clause 2. *See id.* In a passage equally descriptive of United States' dealings with Native Hawaiians, this Court described the origin and nature of the special relationship as follows:

> In the exercise of the war and treaty powers, the United States overcame the Indians and took possession of their lands, sometimes by force, leaving them an uneducated, helpless and dependent people, needing protection against the selfishness of others and their own improvidence. Of necessity, the United States assumed the duty of furnishing that protection, and with it the authority to do all that was required to perform that obligation and to prepare the Indians to take their place as independent, qualified members of the modern body politic. . . .

Id. at 552 (quoting *Board of County Comm'rs v. Seber*, 318 U.S. 705, 715, 87 L.Ed. 1094, 63 S.Ct. 920 (1943)).

The Court rejected the notion that the preference was granted to "Indians . . . as a discrete racial group." *Id.* at 554. The preference was applied rather to "members of quasi-sovereign tribal entities whose lives and activities are governed by the BIA in a unique fashion." *Id.* Thus, the Court did not apply strict scrutiny to the preference, but rather held that, "[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians, such legislative judgments will not be disturbed." *Id.* at 555. The regulation at issue required membership in a tribe, but later decisions indicate that membership in a federally recognized tribe is not necessary for the test to apply.

B. This Court Has Applied the *Mancari* Test to Legislation Involving Indians Who Were Not Members of a Federally Recognized Tribe

Petitioner argues that the federal government can have a special relationship only with federally-recognized tribes and their members. Petitioner's Brief at 39-40, *Olson* (No. 98-818). Contrary to Petitioner's assertion the special relationship can exist where there is no federally recognized tribe or no tribe at all.

1. Members of Tribes Whose Government To Government Relationship With the United States Has Been Terminated May Nevertheless Continue to Hold Special Rights

In *Menominee Tribe v. United States*, 391 U.S. 404, 412-13 (1968), the Court upheld a decision by the Court of Claims that the Menominee Tribe possessed hunting and

fishing rights under the 1854 Wolf River Treaty, and that those treaty rights were not abrogated by the Menominee Indian Termination Act of 1954. Treaty rights are one of the clearest manifestations of the special relationship between the United States and Indian tribes. Yet, notwithstanding the Congressional termination of the government to government relationship between the Menominee Tribe and the United States, the Menominee Tribe continued to possess its treaty rights. *See id. Menominee* was successfully relied upon to uphold the hunting and fishing rights of the Klamath Tribe, whose government to government relationship had also been terminated. *Kimball v. Callahan*, 493 F.2d 564, 567-69 (9th Cir. 1974), *cert. denied*, 419 U.S. 1019 (1974).

In the Alabama-Coushatta Termination Act, 25 U.S.C. §§ 721-728 (1994), Congress provided for termination of the trust relationship between the Tribe and the United States, but further provided: "That after August 21, 1954 such Indians shall be eligible for admission, on the same terms that apply to other Indians, to hospitals and schools maintained by the United States." 25 U.S.C. § 722 (1994).[9]

These authorities show indisputably that a federally recognized tribe need not be involved at all for Indians to hold special rights. Other cases demonstrate that

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[9] Other federal statutes conferring benefits on Native Americans provide that terminated tribes fall within their scope. *See, e.g.*, Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c) (1994); Native American Languages Act, 25 U.S.C. § 2902(1)-(2) (1994).

Congress' power exists even when Indians are not members of any tribe.

2. *Weeks* Applied the *Mancari* Test to a Congressional Distribution Scheme Allowing Benefits to Some Indians Who Were Not Members of a Tribe, While Denying Benefits To Other Indians Not Members of a Tribe

In *Delaware Tribal Business Comm. v. Weeks*, a group of Indians, not members of any tribe, challenged, on equal protection grounds, a congressional distribution scheme excluding them from sharing in an award from the Indian Claims Commission. *See* 430 U.S. 73, 75 (1977). The distribution scheme did allow participation by other Indians who were "closely affiliated with," 430 U.S. at 86, or "clearly identified with" 430 U.S. at 89 n.22 a tribe but not members of the tribe. Indians excluded from the distribution were descendants of Indians who had chosen to remain in Kansas (Kansas Delawares) and "dissolve their relations with their tribe," after their tribe had relocated to Oklahoma. *See id.* at 78 (citation omitted). The Indian Claims Commission held that prior to the relocation, the United States had breached its trust duty to the tribe by selling certain tribal lands at private sale certain lands rather than at public sale, thus reducing the Kansas Delawares' pro rata share of assets received when they left the tribe. *See id.* at 78-79.

The Court held "that the legislative judgment should not be disturbed '[a]s long as the special treatment can be tied rationally to the fulfillment of Congress' unique obligation toward the Indians. . . . " *Id.* at 85 (quoting

Mancari, 417 U.S. at 555). *Weeks* constitutes clear application of the *Mancari* principle to a situation where tribal Indians were not involved.

3. *United States v. John* Upheld the Provisions of the IRA as Applied to Indians Not at That Time a Tribe

In *United States v. John*, 437 U.S. 634 (1978), this Court reviewed the conviction of Smith John, a Choctaw Indian, under state law. The Court reviewed Choctaw history and found that the federal government had made several efforts to remove the Choctaws from the state of Mississippi, including the Treaty at Dancing Rabbit Creek. That Treaty, in addition to providing for removal also allowed Choctaws to "remain and become a citizen of the State," to receive land and not to "lose the priviledge of a Choctaw citizen." *Id.* at 641 (quoting Treaty at Dancing Rabbit Creek, Sept. 27, 1830, U.S. – Choctaw Tribe, 7 Stat. 333).

In the 1930s, the federal Indian policy had shifted back to preserving Indian communities, as reflected in the Indian Reorganization Act of 1934. *See id.* at 645. The Mississippi Choctaws voted to accept the provisions of the Act. *See id.* at 645-646. In 1939 Congress passed an act placing title to all the lands previously purchased for the Mississippi Choctaws in trust, and in 1944, the Secretary of the Interior proclaimed the lands a reservation. *See id.* at 646. In 1945, the Mississippi Band of Choctaw Indians adopted a constitution under the Indian Reorganization Act and the constitution was duly approved by the federal authorities in 1945. *See id.* at 646.

The Mississippi Supreme Court had held that the 1944 proclamation had no effect because the Indian Reorganization Act was not meant to apply to the Mississippi Choctaws. *See id.* at 649. This Court disagreed since the IRA defined "Indians" to include "all other persons of one-half or more Indian blood" even if not members of a recognized tribe. *Id.* at 650. The Court rejected the argument that federal powers over the Choctaw were lessened by the history of federal neglect and unchallenged state jurisdiction. *See id.* at 652-53. "Neither the fact that the Choctaws in Mississippi are merely a remnant of a larger group of Indians, long ago removed from Mississippi, nor the fact that federal supervision over them has not been continuous, destroys the federal power to deal with them." *Id.* at 653. This Court's recognition of federal authority to deal with a remnant of a tribe striving to establish its own sovereignty is clear precedent for federal authority to deal with Native Hawaiians who likewise seek to reestablish their sovereignty.

Menominee, *Weeks*, and *John*, all conspicuously absent from Petitioner's brief, destroy the proposition that Congress' power to create a special relationship depends on the existence of a federally-recognized tribe. Congress in fact legislates today generally as to indigenous peoples without regard to tribal status. *See, e.g.*, National Housing Act, 12 U.S.C. §§ 1701, 1715z-13a(1)-(3) (1994); Indian Health Care Improvement Act, 25 U.S.C. §§ 1601, 1603(c) (1994); Indian Land Consolidation Act, 25 U.S.C. § 2201(2) (1994); Indian Civil Rights Act, 25 U.S.C. § 1301(4) (1994).

C. The Fifteenth Amendment Did Not Affect Federal Dealings with Indigenous Peoples

Petitioner and *amici* in support of Petitioner argue that the Fifteenth Amendment to the Constitution forbids any restriction on voting rights in any kind of election, whether such election occurs in relation to indigenous affairs or not. The Civil War Amendments were not intended to affect Indian affairs. The text of the Fourteenth Amendment, in describing representation of states in Congress removed the three-fifths representation of slaves that was in article I, section 2, clause 3, but it retained and repeated the exclusion of "Indians not taxed" from representation. *See* U.S. Const., 14th amend. § 2. In the 1870s, that phrase indicated that Indians remained outside the political system. The Fifteenth Amendment was adopted about a year and a half after the Fourteenth Amendment, apparently because of some doubt as to whether the 14th prohibited racial discrimination in elections. The Fourteenth Amendment provides that:

> [W]hen the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged . . . the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

U.S. Const., 14th amend. § 2.

Arguably this amendment allowed states willing to suffer that penalty to exclude former slaves and other blacks from voting. The Fifteenth Amendment removed any doubt on that score. *See United States v. Reese*, 92 U.S. 214, 217-18 (1875). But neither the Fourteenth nor Fifteenth Amendments affected federal action involving Indians. *Elk v. Wilkins*, 112 U.S. 94 (1884) (Fourteenth and Fifteenth Amendments not violated by denial of Indian's right to vote in city election).

Innumerable elections sponsored by the federal government have been restricted to persons with Indian blood. More than 100 IRA governments were set up as a result of federally conducted elections among groups of Indians. *See* T. Haas, *Ten Years of Tribal Government Under I.R.A.* 17 (U.S. Indian Service, Tribal Relations Pamphlet No. 1 (1947) cited in *John*, 437 U.S. at 646 (copy lodged with the Co[illegible]. Several tribes, like the Menominee, were terminated, then restored with federally conducted elections among the former members. The Menominee Restoration Act dealt with eligible voters for the Menominee Restoration Committee as follows:

> In the absence of a completed tribal roll prepared pursuant to subsection (c) of this section and solely for the purposes of the general council meeting and the election provided for in subsection (a) of this section, all living persons on the final roll of the tribe published under section 893 of this title, and all descendants, who are at least eighteen years of age and who possess at least one-quarter degree of Menominee Indian blood, of persons on such roll shall be entitled to attend, participate, and vote

> at such general council meeting and such election.

25 U.S.C. § 903(b). In addition, Native-only elections are held in state-chartered corporations pursuant to the Alaska Native Claims Settlement Act, as amended, 43 U.S.C. § 1606(g), (h)(1)(2) (1994); *see generally* 43 U.S.C. §§ 1601-1629a (1994). These elections, so necessary to the "special relationship" between the federal government and its indigenous peoples are outside the reach of the Fifteenth Amendment.

III. HAWAI'I HAS DEALT WITH NATIVE HAWAIIANS AS AN INDIGENOUS PEOPLE IN A MANNER CONSISTENT WITH FEDERAL LAW AND POLICY

The United States has expressly confirmed that the Hawaiian people are an "indigenous . . . people." Joint Resolution to Acknowledge the 100th Anniversary of the January 17, 1893 Overthrow of the Kingdom of Hawaii, Pub. L. No. 103-150, 107 Stat. 1510, 1512 (1993); and in the 1994 Native Hawaiian Education Act, 20 U.S.C. § 7902(1) (1994) ("Native Hawaiians are a distinct and unique indigenous people . . . "). Congress has also recognized and confirmed the existence of a "special relationship" between the United States and Native Hawaiians. *See* 1994 Native Hawaiian Education Act, 20 U.S.C. § 7902(7)-(13) (1994) (discussing the Hawaiian Homes Commission Act, Act of July 9, 1921, ch. 42, 42 Stat. 108 (1921), the 1959 Admission Act, Act of March 18, 1959, Pub. L. No. 86-3, 73 Stat. 4 (1959), and other statutes expressing the special relationship). "In recognition of the special relationship which exists between the United

States and the Native Hawaiian people, the Congress has extended to Native Hawaiians the same rights and privileges accorded to American Indian, Alaska Native, Eskimo, and Aleut communities . . . " *Id.* at 7902(13).[10]

The federal government can and has delegated some authority in indigenous matters to Hawai'i and has ratified Hawai'i's actions toward Native Hawaiians as well. *Washington v. Yakima Indian Nation*, 439 U.S. 463 (1979).[11] NCAI relies on the brief of Respondent and *amicus* OHA for a detailed discussion of these issues, but would note generally that the United States has acknowledged responsibility for the illegal overthrow of the Kingdom of Hawai'i, "the sovereign, independent, internationally recognized, and indigenous government of Hawai'i," 20 U.S.C. § 7902(5) (1994), and also specifically:

> (2) recognizes and commends efforts of reconciliation initiated by the State of Hawaii . . . with Native Hawaiians;
>
> (4) expresses its commitment to acknowledge the ramifications of the overthrow of the Kingdom of Hawaii, in order to provide a proper foundation for reconciliation between the

[10] In addition to the statutes listed in that provision, see a more complete listing of legislation treating Native Hawaiians the same as Indians in Jon M. Van Dyke, *The Political Status of the Native Hawaiian People*, 17 Yale L. & Pol'y Rev. 95, 106 n.67 (1998).

[11] There are other examples of delegation of the federal authority over Indian affairs to states. *See, e.g, Alabama-Coushatta Indian Tribe of Texas v. Mattox*, 650 F.Supp. 282, 289 (W.D. Tex. 1986) (discussing transfer of the entire trust responsibility from the federal government to Texas).

> United States and the Native Hawaiian people; . . .

107 Stat. at 1510. A movement to restore self-determination to Native Hawaiians, consistent with the Apology Resolution, and having the support of the State of Hawai'i is in process.[12] Hawai'i's efforts to honor federal and state commitments to Native Hawaiians is clearly compatible with federal law and should be insulated from strict scrutiny.

Congress has expressed a general intent in the Apology Resolution to finish the job that it began with the Hawaiian Homes Commission Act, Act of July 9, 1921, ch. 42, 42 stat. 108 (1921), the Admissions Act, Act of March 18, 1959, Pub. L. No. 86-3, 73 stat. 4 (1959), and additional legislation throughout the years of restoring the proper place of Native Hawaiians among this country's self-governing indigenous peoples. Hawai'i's actions at issue here further that general goal and should not be disturbed.

[12] An Act Relating to Hawaiian Sovereignty, ch. 359, § 1(6), 1993 Haw. Sess. Laws 1009, 1010; An Act Relating to Hawaiian Sovereignty, ch. 200, § 1, 1994 Haw. Sess. Laws 479, 479; An Act Relating To The Public Land Trust, ch. 329, § 1, 1997 Haw. Sess. Laws 2072, 2072.

CONCLUSION

The decision of the Ninth Circuit Court of Appeals should be affirmed.

Respectfully submitted,

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